88-1075

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MAURICE BASKIN *
VENABLE, BAETJER, HOWARD & CIVILETTI
1301 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20004
Telephone: (202) 662-4300
Attorneys for Petitioners

* Counsel of Record

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the unprecedented, court-ordered curtailment of statutorily mandated notice and comment procedures, in connection with the promulgation of the revised Hazard Communication Standard by the Occupational Safety and Health Administration (OSHA), has violated Section 6 of the Occupational Safety and Health Act and Section 553 of the Administrative Procedure Act, and has created a conflict within the circuits.

2. Whether the Court of Appeals' failure to require OSHA to find that the provisions of the revised Standard are reasonably necessary and appropriate to reduce a significant risk of harm to workers in the construction industry creates a conflict within the circuits and conflicts with Section 3(8) of the OSH Act and with decisions of this Court.

3. Whether the Court of Appeals' failure to require OSHA to demonstrate that the revised Standard is feasible, in the unique circumstances of the construction industry, conflicts with Section 6 of the OSH Act and decisions of this Court and creates a conflict within the circuits.

4. Whether the Court of Appeals' interference with the Office of Management and Budget's lawful disapproval of burdensome information collection requirements contained in the revised Standard, creates a conflict within the circuits and violates the Paperwork Reduction Act, 44 U.S.C. § 3501.

LIST OF PARTIES

The present petitioners Associated Builders and Contractors, Inc. (ABC) and the Construction Industry Trade Associations (CITA)* were parties to two related decisions of the United States Court of Appeals for the Third Circuit from which certiorari is being sought in this single petition.

In *Associated Builders and Contractors v. Brock*, C.A. Nos. 88-3345, 88-3346, 88-3347, 88-3348 (Nov. 25, 1988), ABC was a petitioner and CITA an intervenor. Other parties below were co-petitioners Associated General Contractors of America and the Associated General Contractors of Virginia, United Technologies Corporation, and National Grain and Feed Association, Inc. and Intervenors National Paint and Coatings Association, Building and Construction Trades Dept., AFL-CIO, Public Citizen, Inc. and the Connecticut Council on Occupational Safety and Health.

In *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988), *reh. den.* (Nov. 28, 1988), ABC and CITA were both intervenors. Petitioners in that case were United Steelworkers of America, Public Citizen, Inc., and the states of New York, Illinois and Massachusetts. AGC, UTC and NGFA also intervened.

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* Petitioner CITA consists of a coalition of the following construction industry trade associations, representing over 200,000 member employers, who intervened in both cases: The National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall & Ceiling Industries-International, Insulation Contractors Association of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheetmetal and Air Conditioning Contractors National Association.

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OPINIONS BELOW

Certiorari is being sought in connection with two related cases recently decided by the United States Court of Appeals for the Third Circuit. The decision of the Court of Appeals in *Associated Builders and Contractors, Inc. et al., v. Brock*, dated November 25, 1988, is not yet reported. (A-1). The decision of the same court in *United Steelworkers of America v. Pendergrass (USWA III)*, dated August 19, 1988, is reported at 855 F.2d 108. (A-24a). The Court's denial of rehearing *en banc* in the latter case dated November 28, 1988 has not been reported. (A-38a). Previous decisions of the same court in the same matter *(USWA I* and *USWA II)* are reported at 763 F.2d 728, and 819 F.2d 1263, respectively.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered related judgments in this case on November 25, 1988 and November 28, 1988. Jurisdiction to hear this case is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following provisions are pertinent to this case:

Section 3(8) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(8) provides:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

Section 6(b)(2) of the Act, 29 U.S.C. § 655(b)(2) provides:

> The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5) provides:

> The Secretary, in promulgating standards dealing with toxic material or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the

basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

The Paperwork Reduction Act, 44 U.S.C. § 3502 provides:

> (4) The term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reports or recordkeeping requirements, or other similar methods calling for either—
>
> (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;
>
> * * * *
>
> (11) the term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information;

Section 3504(c) provides:

> (c) The information collection request clearance and other paperwork control functions of the Director shall include—
>
> (1) reviewing and approving information collection requests proposed by agencies;
>
> (2) determining whether the collection of information by an agency is necessary for the

proper performance of the functions of the agency, including whether the information will be of practical utility for the agency;

STATEMENT OF THE CASE

This petition for writ of certiorari seeks plenary review of the Third Circuit's decisions in *Associated Builders and Contractors v. Brock*, Nos. 88-3345, 88-3346, 88-3347, 88-3348 (Nov. 25, 1988) and *United Steelworkers of America v. Pendergrass (USWA III)*, 855 F.2d 108 (3rd Cir. 1988). In *Associated Builders and Contractors v. Brock* (A-1a), the Third Circuit denied petitions for review of the Occupational Safety and Health Administration's (OSHA's) revised Hazard Communication Standard, as applied to all non-manufacturing industries, and vacated a stay of the Standard earlier granted by a panel of that court with regard to the construction industry. In *USWA II* (A-24a), the Third Circuit further held that the federal Office of Management and Budget ("OMB") had incorrectly disapproved portions of OSHA's revised HCS under the Paperwork Reduction Act and purported to deny a motion for stay pending judicial review.

The revised Hazard Communication Standard, issued in August 1987, requires all employees to provide their employees with information concerning chemicals in the workplace. The standard mandates, *inter alia*, that all employers develop written hazard communication programs for each of their workplaces, that containers of hazardous chemicals in the workplace be labeled, that a Material Safety Data Sheet (MSDS) on each hazardous chemical be maintained at each workplace, and that employees receive hazard training at the inception of their job assignment and whenever a new hazard is introduced.

The revised HCS was issued without regard to statutorily mandated rulemaking procedures, pursuant to an extraordinary series of orders by the Court of Appeals

for the Third Circuit. As a result of the Third Circuit's orders and OSHA's attempt to comply therewith, millions of employers have been deprived of any meaningful opportunity to comment on the revised HCS, and a new Standard has been promulgated which imposes tremendous burdens on small businesses without any improvement in workplace safety.

The original Hazard Communication Standard, issued by OSHA in 1983, covered only the manufacturing sector of the economy and was tailored for the manufacturing workplace. OSHA intended to use the original standard as a prototype to determine whether a hazard communication standard would be beneficial in other industries, and intended to determine later what form those standards should take. 47 Fed. Reg. 12101-02 (March 19, 1982).[1]

In *United Steelworkers of America v. Auchter*, 736 F.2d 728 (3d Cir. 1985) *(USWA I)*, the Court of Appeals ordered OSHA either to reconsider whether the standard should apply to non-manufacturing industries, or to explain to the court why such application would not be feasible. As OSHA was preparing to conduct rulemaking to evaluate whether to extend the standard to other industries, however, the court again intervened in order to expedite the process. The court ordered OSHA to issue a non-manufacturing standard within 60 days, without further rulemaking, or to explain as to each category of excluded workers why such a standard would be "infeasible." *United Steelworkers of America*

[1] In proposing the manufacturing standard, OSHA invited comments on the "appropriateness of the industry scope selected" but flatly stated that "non-manufacturing employers are not covered by the proposal." 47 Fed. Reg. at 12101-02. OSHA further stated it intended to evaluate the effectiveness of the manufacturing standard before determining "at a later date" whether to extend or modify a hazard communication standard for other non-manufacturing industries like construction. *Id.*

v. Pendergrass, 819 F.2d 1263, 1270 (3rd Cir. 1987) *(USWA II)*.

None of the affected non-manufacturing industries were represented before the Court of Appeals in either of its proceedings.[2] The court was not asked to consider whether OSHA had found a hazard communication standard to be reasonably necessary and appropriate to reduce significant risks in the construction industry, or other non-manufacturing industries, as required by Section 3(8) of the Act. Nor did the court address how OSHA should comply with its other statutory rulemaking responsibilities within the assigned 60-day period, such as those dictated by the Construction Safety Act or the Paperwork Reduction Act.[3]

OSHA itself resisted the court's order, pointing out in a petition for rehearing that compliance with the order would likely violate the Act. OSHA's Petition for Rehearing stated in part that, "the record developed for the HCS did not reflect conditions in non-manufacturing industries because it focused on existing practices and desirable implementation methods in manufacturing industries." *Id.* at 8. OSHA further asserted that the court had "erred in a fundamental way by ordering promulgation of a standard whose limited evidentiary underpinnings create a substantial risk of invalidation in the

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[2] Insofar as the non-manufacturing sector was not adversely affected by OSHA's original manufacturing-only HCS, its representatives had no right to petition a court for review of that Standard. *See Fire Equipment Mfrs. Ass'n v. Marshall*, 679 F.2d 679 (7th Cir. 1982) *cert. den.*, 459 U.S. 1105 (1983).

[3] Under the Construction Safety Act, 40 U.S.C. § 333 and OSHA's own regulations, OSHA is required to submit all proposed construction standards to the Advisory Committee on Construction Safety and Health prior to publication. Under the Paperwork Reduction Act, 44 U.S.C. § 3504(h)(1), OSHA is required to submit all proposed information collection requirements to the Office of Management and Budget (OMB) for its approval, prior to publication.

event of subsequent attack." *Id.* at 10. After the court denied OSHA's rehearing petition, however, OSHA chose to extend the manufacturing standard, with some significant revisions, to non-manufacturing industries, with an effective date of May 23, 1988. 52 Fed. Reg. 31852 (August 24, 1987).

The construction industry and others petitioned for review of the revised Standard in several different circuits. The petitioners asserted that, since OSHA had never published a proposed standard applicable to non-manufacturing employers prior to issuing the final revised HCS, as required by Section 6 of the Act, such employers had been unlawfully deprived of the opportunity to comment on the revised standard prior to its publication. Also, the petitioners noted that OSHA had failed to find that the revised standard was reasonably necessary and appropriate to reduce any significant risks in the construction industry, contrary to Section 3(8) of the Act. Finally, the Petitioners argued that OSHA had failed to address the unique characteristics of the construction workplace which make it infeasible to impose a standard designed for implementation in a manufacturing workplace.[4]

Meanwhile, on October 28, 1987, pursuant to its authority under the Paperwork Reduction Act, 44 U.S.C. § 3501, the Office of Management and Budget (OMB) independently disapproved three provisions of the revised Standard. *See* 52 Fed. Reg. 46075 (Dec. 4, 1987). These provisions included (1) the requirement that employers exchange material safety data sheets at multi-employer work sites; (2) an exemption from the requirements of the Standard limited to consumer products used in the

[4] The construction industry has previously been recognized by both OSHA and the courts as requiring unique regulatory treatment due to the unique circumstances of the construction industry workplace. *See United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1310 (D.C. Cir. 1980).

same manner and quantities as intended for consumer use; and (3) an exemption for drugs limited to those in tablet or pill form regulated by the Food and Drug Administration.

The revised Standard was scheduled to go into effect, except for the provisions disapproved by OMB, on May 23, 1988. However, on May 20, 1988, the United States Court of Appeals for the District of Columbia Circuit stayed enforcement of the Standard pursuant to a Motion filed by Petitioners ABC and CITA, while at the same time the court transferred the case to the Court of Appeals for the Third Circuit. On June 24, 1988, a panel of the Third Circuit further stayed the revised Standard, at least with regard to its effects on the construction industry, pending the outcome of the court's ultimate ruling on the merits of the Standard.

Subsequently, pursuant to a Motion for Further Relief filed by the original petitioners in *USWA I and II*, the Court of Appeals in *USWA III* held that the regulations disapproved by OMB did not involve the "collection of information" within the meaning of the Paperwork Reduction Act. (A-24a). The court ordered that the provisions disapproved by OMB should be enforced as "logical outgrowths" of the rulemaking record previously reviewed by the court. The court also purported to deny ABC's Motion for Stay of the Revised Standard, though that Motion had already been ruled on by another panel of the Third Circuit and was no longer before the court. (A-36a). Following the court's order, both the Department of Justice and United Technologies Corporation filed Petitions for Rehearing *en banc*, which were denied by the Court of Appeals on November 28, 1988.

Finally, the Court of Appeals received briefs and heard oral argument on the Petitions for Review filed by ABC and other parties, which challenged enforcement of the revised Hazard Communication Standard. The Court of

Appeals denied the Petitions for Review on November 25, 1988. The court held that notices published by OSHA concerning the possible scope of the original manufacturing Hazard Communication Standard were sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry. (A-11a). The court did not address Petitioners' contention that Section 6 of the Occupational Safety and Health Act further required publication of a proposed rule applicable to their industries prior to promulgation of a final Standard.

With regard to the required "significant risk" finding, the court held that the agency had made such a finding, applicable to all workers who would be exposed to hazardous chemicals, in connection with the promulgation of the original, manufacturing hazard communication standard. (A-12a). The court further held, without citation of authority, that for what it characterized as a "performance-oriented information disclosure Standard", "the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries." (A-13a). The court did not address Petitioners' further contention that, regardless of whether significant risk had been found to exist, OSHA had failed to find that the provisions of the revised Hazard Communication Standard were reasonably necessary and appropriate to reduce such alleged risks in the construction industry, as required by Section 3(8) of the Act.

Finally, with regard to the feasibility issue, the Court of Appeals found only that OSHA had "concluded that the [original manufacturing rulemaking record] contained no credible evidence that the Standard would be technologically or economically infeasible for any industrial sector." (A-14a). The court made no finding that the revised Hazard Communication Standard was in fact feasible, based upon substantial evidence in the record as a whole.

REASONS FOR GRANTING THE WRIT

This case involves the promulgation by OSHA of a safety standard imposing new regulatory burdens on every non-manufacturing employer in the United States, including hundreds of thousands of small employers in the construction industry, without in any way increasing workplace safety. The issues presented are of extraordinary importance not only because of the unnecessary burdens which the new standard will unlawfully impose, but also because of the Court of Appeals' unprecedented abrogation of statutorily mandated administrative procedures prior to promulgation of the Standard and its usurpation of the proper authority of OSHA and OMB. The court's holdings threaten the rights of all interested parties to participate fairly in administrative rulemakings and to be protected against burdensome and infeasible regulations.

The decision of the Court below squarely conflicts with numerous decisions of this Court and other circuits and with the plain language of several statutory provisions governing OSHA's rulemaking process. It is therefore imperative that the Court accept review in order to reestablish the validity of its own holdings and to reaffirm what had been thought to be settled administrative procedures. Absent the Court's intervention, the precedent set by this case will deprive interested parties generally of the opportunity to comment on proposed rules and will result in the promulgation of unnecessary and infeasible OSHA standards that fail to increase workplace safety. Thus, as is further elaborated below, the Court should accept review in order to redress clear violations of the rights of numerous employers presently affected by the revised HCS and to prevent unwarranted disruption of statutorily mandated administrative procedures.

I. The Unprecedented, Court-Ordered Curtailment Of Statutorily Mandated Notice And Comment Procedures, In Connection With OSHA's Promulgation Of The Revised Hazard Communication Standard, Has Violated Section 6 Of The Occupational Safety And Health Act And Section 553 Of The Administrative Procedure Act And Has Created A Conflict Within The Circuits.

The Occupational Safety and Health Act of 1970 provides the Secretary of Labor with the authority to promulgate occupational safety and health standards. The Act sets forth the procedure for promulgation of standards at 29 U.S.C. § 655(b). Section 655(b)(2) provides in pertinent part that

> The Secretary shall *publish a proposed rule* promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. (Emphasis added).

The Administrative Procedure Act, 5 U.S.C. § 553(b) also requires that notice of a proposed rule be published. Under that Act, the Court of Appeals of the District of Columbia Circuit has held that notice "should be sufficiently descriptive of the 'subjects and issues involved' so that interested parties may offer informed criticisms and comments." *Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 48 (D.C. Cir. 1976). *See also Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980); *American Federation of Labor v. Donovan*, 757 F.2d 330, 337-340 (D.C. Cir. 1985).

In the present case, pursuant to the orders of the Court of Appeals, OSHA never published a proposed rule on hazard communication for non-manufacturing employers prior to issuing the revised Standard in final form. Issuance of the non-manufacturing standard thus violated the plain language of OSHA's governing statute.

The only proposed hazard communication standard ever published was one which was expressly limited to manufacturing industries. As OSHA itself stated in the preamble to that rulemaking: "non-manufacturing employers are not covered by this proposal." 47 Fed. Reg. at 12101-02. Following the Court of Appeals' initial ruling in *USWA I*, OSHA issued an Advance Notice of Proposed Rulemaking on November 25, 1985, 50 Fed. Reg. 48794, which merely posed a series of questions as to how an expanded hazard communication standard might work in non-manufacturing industries. The ANPR did not contain a proposed non-manufacturing standard, however, and OSHA did not subsequently issue a proposed rule for non-manufacturers as required by statute and its own regulations, because the Court of Appeals did not allow time for it, prior to publication of the final HCS. In addition, the final non-manufacturing HCS contained significant provisions nowhere mentioned in the manufacturing HCS, including the special treatment of multi-employer worksites. *See* 52 Fed. Reg. 31860-31867.

By issuing a final rule without first issuing a proposed rule applicable to non-manufacturers, OSHA deprived interested parties of their right to comment on specific proposals applicable to them. The Court of Appeals misunderstood and failed properly to address this critical issue. The court's sole discussion of the notice and comment problem consists of its assertion that non-manufacturing employers somehow were placed on notice that they should file comments concerning the original manufacturing standard. (A-11a). However, the alleged opportunity of non-manufacturing employers to comment on a standard applicable solely to manufacturers does nothing to satisfy the statutory requirement that employers have a chance to comment on a proposed rule applicable to *themselves*.

In any event, the court below was also wrong in finding that non-manufacturers were placed on notice that

they should comment on the substance of the manufacturing HCS. OSHA repeatedly made clear its position that the Standard would not apply beyond the manufacturing sector. *See* 47 Fed. Reg. 12101-02. The agency's references to possible expansion of the standard to the non-manufacturing sector never stated or implied that such a drastic event would occur without prior notice of a specific, proposed rule. Thus, the Court of Appeals' holding was clearly erroneous and is in direct conflict with numerous cases in other circuits dealing with notice and comment procedures. *See Chamber of Commerce of United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980); *American Federation of Labor v. Donovan*, 757 F.2d 330, 337-40 (D.C. Cir. 1985); *Ethyl Corp. v. EPA*, 514 F.2d 1, 48 (D.C. Cir. 1976).[5]

It is beyond the resources of industry groups to comment on every rule which OSHA proposes, no matter how attenuated its effects on their interests. The Court of Appeals' decision would compel parties to file comments on every proposed standard, however, for fear that they will otherwise waive their right to comment when the standard is applied to them at a later date. Moreover, OSHA could easily circumvent statutory notice and comment procedures under the lower court's holding merely by routinely requesting comments on the possible scope of all proposed standards.

Such a result will lead to the filing of time consuming "protective" comments by unaffected parties in every OSHA proceeding, thereby weighing down the agency with unnecessary paper and further taxing its already strained

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[5] The actions of the court below also conflicted with this Court's holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 550 (1978), in which the Court expressly prohibited the courts of appeals from "straying beyond the judicial province to explore the procedural format or to impose on the agency [their] own notion of which procedures are 'best' or most likely to further some vague, undefined public good."

resources. Alternatively, future interested parties, like the present petitioners, will find themselves subjected to a burdensome and perhaps needless standard without having any meaningful opportunity to comment thereon, because of an inadequate OSHA rulemaking record. Neither result is contemplated by the statute. Therefore, the Court of Appeals' decision must be reversed by this Court in order to prevent the statute's plain language from being violated.

II. The Decision Of The Court Below Is Directly In Conflict With Decisions Of This Court And Of Other Circuit Courts Holding That OSHA Is Required By Section 3(8) Of The Act To Make A Finding That The Provisions Of A New Safety Standard Are Reasonably Necessary And Appropriate To Reduce A Significant Risk Of Harm To Employees In The Affected Industry.

Under previously settled law, OSHA cannot impose new and burdensome standards without first finding, based on substantial evidence in the record, that each provision of the new standard is "reasonably necessary and appropriate" to reduce a "significant" risk to employees. *See* Section 3(8) of the Act, 29 U.S.C. § 652(8). In *American Textile Manuf. Inst. v. Donovan*, 452 U.S. 490, 536-40 (1981), this Court struck down a portion of OSHA's cotton dust standard because OSHA failed to show that each *specific* provision contributed to increased safety in the textile industry. Similarly, in *Industrial Union Dept. AFL-CIO v. American Petro. Inst.*, 448 U.S. 607 (1980), a plurality of this Court invalidated OSHA's benzene standard because of the agency's inadequate explanation as to how the rule would reduce or eliminate a significant risk to employees.

In the present instance, the Third Circuit held without citation to authority that because the HCS is a

> performance-oriented information disclosure standard covering thousands of chemical substances used

> in numerous industries . . . the significant risk requirement must of necessity be satisfied by a *general finding* concerning all potentially covered industries

(A-13a). (Emphasis added). This holding clearly contradicts Supreme Court precedent. It also conflicts directly with the decision of the Court of Appeals for the Fifth Circuit in *Texas Independent Growers Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980). There, the Fifth Circuit partially struck down OSHA's cotton dust standard because the agency improperly relied on risk data concerning cotton dust's effects in manufacturing industries when it extended the standard to the entirely separate ginning industry. In *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1309-10 (D.C. Cir. 1980), on the other hand, the Court of Appeals for the D.C. Circuit upheld the construction industry's exemption from OSHA's lead exposure standard due to the unique work practices and lower degree of exposures among construction's transient, open-air workforce.

The court below also created a direct conflict between the circuits and with the statute by focusing exclusively on the question of whether a "significant risk" had been shown, without making any determination that the standard is "reasonably necessary and appropriate" to reduce that risk. *See Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1485 (D.C. Cir. 1986). Construction industry employers, unlike other industries, are already required by OSHA to provide hazard communication training to their employees. 29 C.F.R. 1926.21. There has been no showing that the additional burdens imposed by the revised HCS will reduce any alleged risk of harm among construction employees. Thus, on this ground as well, the Court of Appeals' decision was plainly wrong and must be reversed.[6]

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[6] Again, the court addressed the existing training requirements solely in the context of whether a significant risk existed. The court failed to address how the new provisions of the HCS con-

No authority exists to create a distinction between a "performance-oriented," informational standard as opposed to any other type of standards. A plurality of this Court has held that Section 3(8) of the Act requires OSHA to find that *all* standards are reasonably necessary and appropriate to reduce significant risk. *Industrial Union Dept. AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980). Therefore, the Court should grant certiorari in order to review the lower court's apparent, blatant departure from the Court's prior holdings and to resolve the conflict in the circuits on this issue.

III. The Court Of Appeals' Decision To Require OSHA Merely To Show That The Revised HCS Was Not *Infeasible*, Directly Conflicts With Decisions Of This Court And Other Circuit Courts Requiring OSHA To Find That Any New Safety Standard Is Feasible Based Upon Substantial Evidence In The Record As A Whole.

The Third Circuit has further erred in shifting OSHA's burden of proving the technological and economic feasibility of the proposed standards for each industry to one in which petitioners must prove *in*feasibility in order to void the standard. The court found that because OSHA had established that employee training and maintenance of labels and material safety data sheets is feasible in the manufacturing sector it need not do so for the non-manufacturing sector. (A-14a).

The holding of the court below fails to take into account the unique circumstances of the construction industry and conflicts sharply with this Court's decision in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981). The Court there squarely held that OSHA's standards can only be upheld if they are shown to be

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tributed anything over and above the existing requirement to increased worker safety, and the record contains no evidence whatsoever of risk reduction resulting from the revised HCS in the construction industry.

feasible, based upon substantial evidence in the record as a whole. The Court of Appeals' decision also conflicts directly with the D.C. Circuit's decision in *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) and the Fourth Circuit's decision in *Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1452 (4th Cir. 1985) (en banc). In these decisions, the courts held that the feasibility of an OSHA standard must be proved by the agency for each affected industry.

In the present case, the record was totally inadequate for OSHA to make findings of feasibility in the construction industry, as OSHA itself admitted in its petition for rehearing following *USWA II*. Construction employers, unlike manufacturers, are frequently confronted with transient and mobile workforces, multiple worksites at remote locations, nonexistent administrative facilities and small profit margins with which to absorb the high costs imposed by the revised Standard.[7] None of these factors have been taken into account, either by OSHA or the court below.

Thus, Supreme Court intervention is necessary to resolve an important conflict in the circuits as to the burden OSHA must sustain in establishing the feasibility of standards which affect numerous and different sectors of the economy. Resolution of this issue is particularly important insomuch as OSHA is now developing a "generic" standard applicable to the entire economy, ad-

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[7] The most recent estimates of the likely costs of compliance with the revised HCS, for a typical construction contractor employing 10 employees, are that the company will have to spend an additional $15,000 in the first year alone, followed by substantial additional costs in subsequent years. Based on the average net profits of typical construction employers, it has further been estimated that compliance with the revised HCS as written will wipe out the profits of a substantial percentage of industry employers. See Comments filed with OSHA by the Construction Industry Hazard Communication Coalition, Docket No. H-022D, Oct. 28, 1988.

dressing exposure limits for several hundred toxic substances. *See* 53 Fed. Reg. 20960 (June 7, 1988).

IV. The Court Of Appeals' Decision Conflicts Directly With The Paperwork Reduction Act And With A Decision In The D.C. Circuit In That It Interferes With OMB's Lawful Disapproval Of Burdensome Information Collection Requirements.

As noted above, certiorari is also being sought herein with regard to the Court of Appeals' decision in *USWA III*, because in that decision the Third Circuit has utterly misconstrued the scope and purpose of the Paperwork Reduction Act.

OMB's disapproval of part of the revised HCS, in and of itself, lends credence to petitioners' claims that the standard was defective and unlawful. The court's arbitrary attempt to invalidate OMB's disapproval removes an important safeguard against regulatory abuse and must not be permitted by this Court, and creates a conflict among the circuits.

The language of the Paperwork Reduction Act applies to the collection of all information required by a federal agency for any regulatory purpose. This interpretation has been upheld previously in *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988). In that case, the D.C. Circuit rejected the argument that the Act applied only to documents required to be furnished to an agency, noting that Congress was not "concerned solely or primarily with private parties' costs of *mailing* data to Washington, it is the record-keeping and data-gathering that constitute the burden." 846 F.2d at 1453. The Third Circuit's decision conflicts with that of the D.C. Circuit and effectively eviscerates the Act, leaving employers with no protection from burdensome and unnecessary paperwork regulations.

Contrary to the effect of the Third Circuit's decision, nothing in the Act exempts federally-sponsored informa-

tion disclosures from coverage. The legislative history of the Act emphasizes a specific congressional intent to cover such disclosures as well. *See* H.Rep. No. 96-835, 96th Cong., 2d Sess. at 23 (March 19, 1980); S.Rep. No. 96-930, 90th Cong., 2d Sess. at 39-40, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6279-80; 132 Cong. Rec. S16741 (Oct. 16, 1986). The Act grants the OMB independent authority over agency regulation to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency." 44 U.S.C. §§ 3504(c)(2), 3518.

However, the Third Circuit construed Section 3518(e) to deny the Director the authority to determine whether a particular paperwork requirement is necessary or useful to accomplish a particular substantive policy. This erroneous interpretation removes the Director's authority under section 3504(c)(2) to review the "necessity" and "practical utility" of paperwork requirements. The only interpretation which preserves both the agency's substantive mission and the Act's purposes is that the agency makes the policy and OMB determines whether a proposed paperwork requirement is necessary or useful in achieving that policy. As the government itself has argued to the lower court, the Third Circuit's holding contradicts the plain language of the Act, creates a conflict within the circuits and further violates this Court's holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). The Supreme Court should accept review in order to resolve these conflicts and reinstate OMB's intended role in regulating the paperwork burden imposed by administrative agencies.

CONCLUSION

For these reasons, and upon the entire record herein, Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MAURICE BASKIN *
VENABLE, BAETJER, HOWARD
& CIVILETTI
1301 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20004
Telephone: (202) 662-4300
Attorneys for Petitioners

* Counsel of Record

Date: December 28, 1988

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,
and
JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,
and
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)

United Technologies Corporation, Associated General Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 83-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO,
Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF LABOR

Argued: September 16, 1988

Before: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

(Opinion Filed: November 25, 1988)

BENJAMIN R. CIVILETTI, ESQ.
ROBERT G. AMES, ESQ.
MAURICE BASKIN, ESQ. (Argued)
VENABLE, BAETJER, HOWARD & CIVILETTI
1301 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20004

Attorneys for Petitioner, Associated Builders and Contractors and Construction Industry Intervenors

MARC L. FLEISCHAKER, ESQ. (Argued)
GINA M. ZAWITOSKI, ESQ.
V. DANIEL PALUMBO, ESQ.
AREN T, FOX, KINTNER, PLOTKIN
& KAHN
Washington Square
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

Attorneys for Petitioner, The National Grain & Feed Association, Inc.

STEPHEN C. YOHAY, ESQ. (Argued)
ANN ELIZABETH REESMAN, ESQ.
McGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005

ROBERT E. WILLIAMS, ESQ.
Of Counsel

Attorneys for Petitioners, The Associated General Contractors of Virginia and The Associated General Contractors of America

W. SCOTT RAILTON, ESQ. (Argued)
DIANE F. KILLIOIN, ESQ.
SUSAN A. KUNST, ESQ.
REED SMITH SHAW & McCLAY
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036-4192

Attorneys for Petitioner,
United Technologies Corporation

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor for Special Appellate
and Supreme Court Litigation

STEVEN J. MANDEL
Counsel for Appellate Litigation

NATHANIEL I. SPILLER (Argued)
EDWARD D. SIEGER
Attorneys

U.S. Department of Labor
Room N2700
Washington, D.C. 20210

Attorneys for the Secretary of Labor

GEORGE H. COHEN, ESQ.
JEREMIAH A. COLLINS, ESQ.
MICHAEL H. GOTTESMAN, ESQ.
JOHN ROTHCHILD, ESQ.
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036

MARY-WIN O'BRIEN, ESQ.
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

LAURENCE GOLD, ESQ. (Argued)
815 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Intervenor,
United Steelworkers of America, AFL-CIO, CLC

ELIHU I. LEIFER, ESQ.
VICTORIA L. BOR, ESQ.
CHRISTOPHER S. RICHARDSON, ESQ.
SHERMAN, DUNN, COHEN, LEIFER
& COUNTS
1125 Fifteenth Street, N.W.
Suite 801
Washington, D.C. 20005

Attorneys for Intervenor,
Building and Construction Trades
Department, AFL-CIO

BRUCE H. HAMILL, ESQ.
1500 Rhode Island Avenue, N.W.
Washington, D.C.

TIMOTHY J. WATERS, ESQ.
McDERMOTT, WILL & EMERY
1850 K Street, N.W., Suite 500
Washington, D.C. 20006-2296

Attorneys for Intervenor,
National Paint & Coatings Association

DAVID C. VLADECK, ESQ.
Public Citizen Litigation Group
2000 P Street, N.W.
Washington, D.C. 20036

Attorney for Intervenor, Public Citizen, Inc. and
the Connecticut Council on Occupational
Safety and Health

PETER L. de la CRUZ, ESQ.
MARY CHAMBERS GRANDY, ESQ.
KELLER AND HECKMAN
1150 - 17th Street, N.W.
Suite 1000
Washington, D.C. 20036

Attorneys for Amicus, The Styrene
Information and Research Center

OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Before the court are four petitions for review of the revised hazard communication standard promulgation by the Secretary of Labor pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b) (OSH Act). The petitioners are the Associated Builders and Contractors, Inc. (ABC), the National Grain & Feed Association, Inc. (NGFA), the Associated General Contractors of Virginia, et al. (AGC), and United Technologies Corporation (UTC). These petitions were initially filed in the District of Columbia Circuit, the Second Circuit, and the Fourth Circuit. Since the filing in the District of Columbia Circuit was earliest, the other petitions were transferred and consolidated there. Thereafter, the Building and Construction Trades Department, AFL-CIO intervened, and on the motion of the intervenors the petitions were transferred to this court. The transfer order was made because the hazard review standard was before this court on three prior occasions. *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*USWA I*); *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*); *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) (*USWA III*). Because those prior decisions are controlling, we will deny the petition for review.

I.

In USWA I this court ordered the Occupational Safety and Health Administration (OSHA) to apply its recently promulgated hazard communication standard not only to the manufacturing sector, but to the non-manufacturing sector as well, unless the agency could "state reasons why such application would not be feasible." 763 F.2d

at 739. Except for a part of its treatment of trade secrets, the hazard communications standard was otherwise upheld. 763 F.2d at 743.

In *USWA II*, the petitioners in *USWA I* returned to the court seeking to enforce the judgment in that case. OSHA, following the *USWA I* judgment, had issued a notice of proposed rulemaking, claiming that the record was insufficient to determine the issue of feasibility of the standard outside the manufacturing sector. This court held that OSHA was not in compliance with the *USWA I* judgment, which did not contemplate notice and comment. It ordered OSHA to promulgate, within 60 days, a hazard communications standard applicable to all workers covered by the OSH Act, or state reasons separately, as to each category of excluded workers, why, on the basis of the present administrative record, a hazard communication standard is not feasible. 819 F.2d at 1270.

In *USWA III* the original petitioners moved for further relief in enforcement of the *USWA I* judgment. By then OSHA had on August 24, 1987, published an expanded hazard communication standard applicable to all industries. 52 Fed. Reg. 31852 et seq. (codified at 29 C.F.R. § 1910.1200). This revised standard was to go into effect on May 23, 1988. 29 C.F.R. § 1019.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB)). OMB, ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, 44 U.S.C. § 3501 et seq. (Supp. 1988), sought public notice and comment "on the recordkeeping, notifications, and other paperwork requirements of the revised standard." 52 Fed. Reg. 36652. Following a public hearing OMB purported to disapprove three provisions which the revised standard adopted. These three new provisions were: (1) a requirement that at multi-employee worksites employers

exchange Material Safety Data Sheets obtained from chemical manufacturers, 29 C.F.R. § 1910.1200(e)(2); (2) an exemption from the labeling requirements of the standard for consumer products used in the same manner and quantities as intended for consumer use, 29 C.F.R. § 1900.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200 (b)(6)(viii). This court held that the regulations disapproved by OMB did not involve the collection of information within the meaning of the Paperwork Reduction Act. 855 F.2d at 113. Summarizing the prior history of the case, we noted:

> In USWA I we directed OSHA to reconsider the application of the hazard communication standard to employees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In USWA II we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). Withdrawal of the provisions disapproved by OMB was accordingly inconsistent with those orders. Re-

> lief by motion is appropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977); *USWA II*, 819 F.2d at 1270.

855 F.2d at 113-14.

II

The present petitioners, unlike those who were the moving parties in *USWA I*, *II*, and *III*, seek to prevent enforcement of the hazard communication standard. Their objections include both procedural and substantive challenges to the promulgated standard.

A.

Sufficiency of Notice of Rulemaking

The four petitioners contend that OSHA violated section 6(b) of the OSH Act, 29 U.S.C. § 655(b), by failing to provide adequate notice of proposed rulemaking affecting their industries. That contention is foreclosed by *USWA II*, which exhaustively detailed the fact that the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding. The court wrote:

> On June 28, 1977 the Secretary published an advance notice of proposed rulemaking on hazardous materials labeling. *See* 42 Fed. Reg. 5,372 (1977). In that advance notice, the Secretary requested "public comment as to whether a standard requiring employers to label hazardous materials should be developed and what should be contained in such standard to assure that employees are apprised of the hazards to which they are exposed." *Id.* All "interested persons" were "invited to submit written data, views, and arguments concerning a standard on hazardous material labeling." *Id.* at 5,373. Among the topics on which comments were requested was "[s]upported cost data of the estimated costs of

> coming into compliance with the recommendations of the advisory committee." *Id.* At this stage in 1977, the notice, like the Advisory Committee Report's recommendation, was addressed to all employers, not only to employers in the manufacturing sector.

819 F.2d at 1265. In the same opinion, this court recognized that the 1982 notice was at least as explicit. That notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included. *Id.* at 1266. Thus this court's holding that the Secretary provided adequate notice to all employers was clearly stated.

The four petitioners urge that since they were not parties to the initial petition for review, they are not bound by the prior panel decision. OSHA, on the other hand, contends that the discussion of the notice of rulemaking in *USWA II* is law of the case. We need not resolve that difference, however, because in any event the facts with respect to the 1981 and 1982 notices have not changed, and a prior panel has applied the law to those facts. Thus *USWA II* is a binding precedent of the court which this panel could not disregard even if it had a mind to do so. Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, 8C. Nor are we of such a mind. The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry. Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected.

B.

The Significant Risk Finding

Several of the petitioners contend that the hazard communication standard is invalid because it was promulgated without a significant risk determination. Under

Sections 3(8) and 6(b)(5) of the OSH Act, 29 U.S.C. §§ 652(8), 655(b)(5), the Secretary must determine that there exists a significant risk of harm to employees and that a standard is reasonably necesary or appropriate to reduce that risk. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 614-15, 639 (1980) (plurality opinion).

The agency record on this issue was reviewed by this court in USWA I. The court upheld OSHA's finding that a section 6(b)(5) standard is required to address a significant risk to workers. 763 F.2d at 735. The significant risk finding applied to all workers who would be exposed to hazardous chemicals. *Id.* at 738. Indeed, the court noted the incongrity of protecting spray painters, for example, in the manufacturing sector, but not in construction. *Id.* at 737.

The agency record on this issue was reviewed once again in *USWA II*. In that case we ordered OSHA, on remand, to consider solely the feasibility of the standard outside the manufacturing sector, not to reestablish its nened. 819 F.2d at 1270. As with the treatment of the notice issue in *USWA I* and *USWA II*, the record on the significant risk issue is unchanged, and this panel is not free to disregard the holdings in those prior opinions of the court.

Petitioners, ABC, AGC, and NGFA, contend that those opinions did not address their specific contention, that OSHA must make a significant risk determination separately for each industry: in this case, construction and grain processing or storage. We do not interpret the opinions so narrowly. The standard was approved for the manufacturing sector, which has twenty major Standard Classification (SIC) Code subdivisions. There is no more obvious need for industry specific significant risk determinations for the construction and grain industries than for subdivisions of the manufacturing sector. The

holdings in USWA I and USWA II sustained a general significant risk finding. Assuming, however, that those opinions were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different. This rulemaking proceeding produced a performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries. For such a standard the significant risk requirement must of necessity be satisfied by a general finding concerning all potentially covered industries. A requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible. We reject, as well, the contention by ABC and AGC that because the construction industry already provides training in hazardous materials handling, there is no significant risk in that industry. At best that argument establishes the existence of risks, and the requirement for maintenance on the jobsite of information on those risks can only make the existing training more effective. As to risks posed by grain dust, the propensity of grain elevators to blow up has been well documented.

C.

The Feasibility Determination

Several petitioners contend that the Secretary's feasibility determination, made after the remand in USWA II, is not supported by the rulemaking record. Unlike the notice of rulemaking and significant risk issues, the feasibility determination, outside the manufacturing sector, has not previously been addressed by this court. Our review of that determination asks whether "the Secretary carried out [her] essentially legislative task in a manner reasonable under the state of the record before [her.]" *Synthetic Organic Chemical Mfrs. Ass'n v. Bren-*

nan, 503 F.2d 1155, 1158 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975) (quoting *Florida Peach Growers Ass'n v. United States Dep't of Labor*, 489 F.2d 120, 129 (5th Cir. 1974)).

When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. The Secretary had, prior to our remand in *USWA I*, already established that the employee training and the maintenance of labels and material safety data sheets is feasible in the manufacturing sector, encompassing a spectrum of SIC Code subdivisions with employers of all sizes. As this court's remand required, the Secretary examined the same rulemaking record, and concluded that it contained no credible evidence that the standard would be technologically or economically infeasible for any industrial sector. That conclusion is on the agency record completely supportable, and we are not permitted to substitute our legislative judgment for that of OSHA. If there are deficiencies in that record they may not be laid at OSHA's door, for as we hold in Part II A above, the affected employers received notice of the rulemaking proceedings.

D

The Unlawful Delegation Contention

One final substantive challenge to the hazard communication standard is advanced on behalf of NGFA, which contends that OSHA unlawfully delegated its rulemaking authority to the American Conference of Governmental Industrial Hygienists (ACGIH) when OSHA incorporated in the standard that organization's Threshold Limit Values for Chemical Substances and Physical

Agents in the Work Environment. ACGIH is an impartial scientific organization which identifies safe exposure levels for various substances.

This court in *USWA I* decided the delegation question when it held, over the objections of the Petitioner Public Citizens, and the State of New Jersey as *amicus*, that OSHA need not itself evaluate specific chemical hazards, but could rely on information developed by chemical manufacturers. 763 F.2d at 739. The reliance on ACGIH is an *a fortiori* case, and *USWA I* controls. Even if it did not control, we would in any event reject the unlawful delegation contention. It was appropriate to adopt ACGIH's list as a floor, while imposing on chemical manufacturers the requirement that they research and assess hazards independently. 20 C.F.R. § 1910.1200(d)(3). That action was fully consistent with section 6(b)(5) of the OSH Act, which directs OSHA to set toxic substance standards based on "the best available evidence" with due consideration to "the latest available scientific data."

III

None of the substantive or procedural challenges to the application of the hazard communication standard to the construction or grain processing and storage industries have merit. The petitions for review of ABC, AGC, and NGFA will therefore be denied. The stay of those standards granted by a panel of this court on June 24, 1988, shall be vacated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for
Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR,
Respondents

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United Technologies Corporation, United Steelworkers of America, AFL-CIO, CLC, The National Grain and Feed Association, Inc., Building and Construction Trades Department, AFL-CIO

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,

Petitioner

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

ORDER AMENDING OPINION

The slip opinion in the above matter, filed November 25, 1988, is hereby amended as follows. The penultimate sentence of section III on page 16 should read: "The petition for review of ABC, AGC, NGFA, and UTC will therefore be denied."

/s/ John J. Gibbons
Chief Judge

Dated: December 5, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3345

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Petitioner

v.

WILLIAM E. BROCK, Secretary of Labor,

and

JOHN A. PENDERGRASS, Assistant Secretary for Occupational Safety and Health,

and

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondents

National Association of Home Builders, American Subcontractors Association, American Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall and Ceiling Industries-International, Insulation Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheet Metal and Air Conditioning Contractors National Association (all of the above herein referred to as the Construction Industry Trade Associations)

United Technologies Corporation, Associated General Contractors of Virginia and the Associated General Contractors of America, Building and Construction Trades Department, AFL-CIO, United Steelworkers of America, AFL-CIO-CLC, National Paint and Coatings Association, National Grain and Feed Association, Inc.,

Intervenors

No. 88-3346

THE NATIONAL GRAIN & FEED ASSOCIATION, INC.,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

National Paint and Coatings Association, Public Citizen, Inc., and the Connecticut Council on Occupational Safety and Health ("ConnCOSH"),

Intervenors

No. 88-3347

THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA

and

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

United Technologies Corporation,
United Steelworkers of America, AFL-CIO, CLC,
The National Grain and Feed Association, Inc.,
Building and Construction Trades Department,
AFL-CIO,

Intervenors

No. 88-3348

UNITED TECHNOLOGIES CORPORATION,
Petitioner

v.

THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

ON PETITION FOR REVIEW OF THE REVISED HAZARD COMMUNICATION STANDARD PROMULGATED BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

Present: GIBBONS, *Chief Judge*, HUTCHINSON and SCIRICA, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the Occupational Safety and Health Administration, United States Department of Labor and were argued by counsel September 16, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review of the revised hazard communication standard promulgated by the said Administration and published at 52 Fed. Reg. 31852, et seq. (August 24, 1987), be, and the same are hereby denied. It is further ordered that the stay of the said standard granted by a panel of this Court on June 24, 1988 is vacated. Costs taxed against the petitioners. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

November 25, 1988

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-3554, 83-3561, 83-3565, 84-3066,
84-3093 and 84-3128

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

THE STATE OF NEW YORK, the STATE OF NEW JERSEY, the STATE OF CONNECTICUT and NATIONAL PAINT & COATINGS ASSOCIATION,
Intervenors.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD COMPANY, and NATIONAL PAINT & COATINGS ASSOCIATION,
Intervenors.

PUBLIC CITIZEN, INC., *et al.*,
Petitioners,

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

THE STATE OF NEW JERSEY, CHEMICAL MANUFACTURERS ASSOCIATION, NATIONAL PAINT & COATINGS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE & ATLANTIC RICHFIELD COMPANY,
Intervenors.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, SECRETARY OF LABOR, UNITED SATES DEPARTMENT OF LABOR,
Respondent.

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR, and RAYMOND DONOVAN, SECRETARY OF UNITED STATES DEPARTMENT OF LABOR,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Submitted Under Third Circuit Rule 12(6)
Aug. 5, 1988

Decided Aug. 19, 1988

David C. Vladek, Public Citizen Litigation Group, Washington, D.C., for petitioner Public Citizen, Inc.

George H. Cohen, Michael H. Gottesman, John Rothchild, Bredhoff & Kaiser, Washington, D.C., Mary-Win O'Brien, United Steelworkers of America, Pittsburgh, Pa., Laurence Gold, Washington, D.C., for petitioner United Steelworkers of America, AFL-CIO-CLC.

John R. Bolton, Asst. Atty. Gen., Stephen C. Yohay, Ann Elizabeth Reesman, McGuiness & Williams, Washington, D.C., for intervenor Associated General Contractors of America.

George R. Salem, Sol. of Labor, Allen H. Feldman, Associate Sol. for Special Appellate and Supreme Court Litigation, Leonard Schaitman, Marleigh D. Dover, Attorneys, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., Steven J. Mandel, for Appellate Litigation.

Nathaniel I. Spiller, U.S. Dept. of Labor, Washington, D.C., Robert G. Damus, Acting Gen. Counsel, Steven D. Aitken, Office of Management and Budget, Washington, D.C., for respondent.

W. Scott Railton, Washington, D.C., for intervenor United Technologies Corp.

Before GIBBONS, Chief Judge, and FISHER,* and KELLY,** District Judges.

OPINION OF THE COURT

GIBBONS, Chief Judge.

I

Once again United Steelworkers of America and Public Citizen, Inc. *et al.*, (petitioners) come before this court on a motion seeking further relief in the enforcement of our judgment in *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir.1985) (USWA I), issued on May 24, 1985. In USWA I we directed the Secretary of Labor to reconsider the application of the hazard communication standard promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 (OSH Act), Pub.L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982), to employees in sectors of the economy other than manufacturing. 763 F.2d at 743. The Secretary took the position that this judgment permitted the commencement of an entirely new rulemaking proceeding. The petitioners, contending that the Secretary was not in good faith complying with our judgment, moved for further relief. In *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir.1987) (USWA II) we held that by commencing a new rulemaking proceeding the Secretary was not complying with our previous judgment. We directed that the Secretary should,

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* Hon. Clarkson S. Fisher, United States District Court Judge for the District of New Jersey, sitting by designation.

** Hon. James M. Kelly, United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered by the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible. Such statement of reasons will be supplied separately as to each category of excluded workers.

819 F.2d at 1270. (Footnote omitted). On August 7, 1987 this court denied the Secretary's petition for rehearing and motion for a stay.

On August 24, 1987 the Occupational Safety and Health Administration (OSHA or the Secretary) published an expanded hazard communication standard applicable to all industries. 52 Fed.Reg. 31852, *et seq.* (codified at 29 C.F.R. § 1910.1200). This August 24, 1987 promulgation includes an OSHA finding that the rulemaking record on the whole supported a determination that the hazard communication standard is feasible in all industries. 52 Fed.Reg. at 31857. It applies the hazard communication standard to employers in all economic sectors, including the labeling requirements, as well as the requirement that covered employers make available for employee inspection Material Safety Data Sheets (MSDS) furnished by the manufacturers of hazardous chemicals used in the workplace, and the requirement that employees be provided with information and training on hazardous chemicals used in their work area. The August 24, 1987 promulgation also includes three provisions not contained in the original hazard communication standard applicable in the manufacturing sector alone. These are: (1) a requirement that at multi-employer worksites employers exchange their MSDSs, either individually or through a central location, 29 U.S.C. § 1910.1200(e)(2); (2) an exemption from the labeling

requirement for consumer products used in the same manner and quantities as intended for consumer use, 29 C.F.R. § 1910.1200(b)(6)(vii); and (3) an exemption from labeling of drugs in tablet or pill form regulated by the Federal Drug Administration. 29 C.F.R. § 1910.1200 (b)(6)(viii). OSHA explained that these modifications were made "to ensure that [the] provisions [of the standard] are practical and effective in communicating hazards to all workers" and in recognition of "the unique characteristics of some businesses [that] render certain provisions of the [previous] standard unnecessary or ineffective in communicating the hazards of chemicals to workers." 52 Fed. Reg. at 31858.

This revised hazard communication standard was to go into effect on May 23, 1988. 29 C.F.R. § 1910.1200(j). On September 10, 1987, however, OSHA submitted it to the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), ostensibly in compliance with the Paperwork Reduction Act of 1980, Pub.L. 96-511, 94 Stat. 2812, 44 U.S.C. § 3501 *et seq.* (Supp.1988). On September 30, 1987, OMB undertook public notice and comment "on the recordkeeping, notification and other paperwork requirements" of the revised standard. 52 Fed.Reg. 36652. Following a public hearing, OMB purported to disapprove the three new provisions referred to in the preceding paragraph. OMB also conditioned its approval of the entire standard on the undertaking by OSHA of further rulemaking to consider OMB's objections. OMB letter of October 23, 1987. Further negotiations between OSHA and OMB followed, and on April 13, 1988 OMB announced that it would permit the revised standard, but without the "disapproved" portions, to go into effect on May 23, 1988 as scheduled.

Meanwhile, two court proceedings regarding the revised standard were initiated. First, Associated Builders & Contractors, Inc. petitioner to review the revised hazard communication standard in the United States Court

of Appeals for the District of Columbia, and moved for a stay of its enforcement in the construction industry. *Associated Builders & Contractors, Inc. v. McLaughlin*, (D.C.Cir. No. 87-1582). This court, on motion of the petitioners, transferred the Associated Builders & Contractors, Inc. petition to this court, but granted an administrative stay "until such time as the third circuit rules on the emergency motion for stay." Order of May 20, 1988. This panel has by a separate order denied that emergency motion.

Second, on April 6, 1988 the petitioners moved in this court for further relief. The effect of the April 13 OMB change of position, allowing the bulk of the hazard communication standard to go into effect, is that the petitioners' charge of non-compliance is now narrowed to the three provisions which OSHA has in effect withdrawn, in compliance with the OMB disapproval.

Both Associated General Contractors of America, and United Technologies Corporation moved in this court to intervene for the purpose of opposing the petitioners' motion for further relief.

II

In this matter of first impression we are called upon to consider the extent to which the Paperwork Reduction Act of 1980 authorizes the OMB to substitute its judgment for that of OSHA with respect to the appropriate communication of hazards in the workplace necessary for compliance with section 6 of the OSH Act. Housed in Chapter 35 of Title 44 of the United States Code, which deals generally with "Public Printing and Documents," the Paperwork Reduction Act is the successor to the Federal Reports Act of 1942, previously codified in that Chapter. To generalize, the purpose of the Federal Reports Act was to coordinate the information collection activities of federal agencies, thereby reducing the cost of those activities to the government and to businesses

and individuals required to file reports. The Paperwork Reduction Act of 1980 moved that function from the Director of the Bureau of the Budget to a new Office of Information and Regulatory Affairs in the Office of Management and Budget.

The Paperwork Reduction Act authorizes OMB to:

> (1) review[] and approv[e] information collection requests proposed by agencies; (2) determin[e] whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency; . . .

44 U.S.C. § 3504(c)(1) and (2). The "information collection requests" referred to in section 3504(c)(1) are defined in section 3502(11) as "written report form[s], application form[s], schedule[s], questionnaire[s], reporting or recordkeeping requirement[s], collection of information requirement[s], or similar method[s] calling for the collection of information." The "collection of information" referred to in section 3504(c)(2) is defined in section 3502(4) as:

> the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—
>
> (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; . . .

44 U.S.C. § 3502(4)(A) and (B). Assuming that the information in issue falls within the Paperwork Reduction Act of 1980, OMB's regulatory authority over it is specifically limited by two provisions of that Act. First, OMB's authority "shall be exercised consistent with applicable law." 44 U.S.C. § 3504(a). Second, the Act provides:

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any federal agency to enforce the civil rights laws.

44 U.S.C. § 3518(e). Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either, (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

As we noted above, OMB disapproved of three provisions of the revised hazard communication standard, each of which was a departure from the standard which OSHA first imposed on employers in the manufacturing sector. Two of those departures are *exemptions* from the labeling requirements of the hazard communications standard. Thus, the revised standard exempts from its coverage (1) consumer products subject to labeling requirements under the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, and the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.*, and (2) drugs

subject to the labeling requirements of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* 29 C.F.R. § 1010.1200(b) (6) (vii) and (viii).

Whatever else the terms "collection of information" or "information collection requests" may refer to, they cannot possibly refer to these exemptions from labeling requirements which would otherwise have been duplicative of the labeling requirements imposed in the interest of health and safety by other federal regulatory agencies. What is left for consideration is the requirement that employers on multi-employer worksites exchange MSDSs, imposed for the first time in the August 24, 1987 promulgation. 29 C.F.R. § 1910.1200(e) (2). We note initially that we are not presented with the question whether the Paperwork Reduction Act of 1980 applies when the federal government requires from non-governmental parties, for its own purposes, compilation but not transmission of information. See *Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449 (D.C. Cir.1988). The multi-employer MSDS exchange provision requires employers, not to compile, but simply to transmit information to covered employees. The sole question it presents is whether that requirement can be said to involve either the "collection of information" or an "information collection request" within the meaning of the Paperwork Reduction Act.

In USWA I we discussed in detail the development by OSHA of the hazard communication standard. We noted that it imposed on chemical manufacturers the obligation to label containers and to furnish to downstream users MSDSs containing chemical common names of each hazardous ingredient, and information necessary for safe use of the product. 763 F.2d at 732. Although the issue was not raised in USWA I, implicit in OSHA's standard, and in this court's approval of it, is the holding that imposing this obligation on chemical manufacturers is an appropriate safeguard for workers in the workplace, as

required by section 6 of the OSH Act. The same must be said for the obligation imposed on downstream employers to make MSDSs available to their employees. *Id.* at 733. In one sense the standard requires chemical manufacturers to collect and transmit information, and employers to collect and maintain information. It would be a far-fetched interpretation of the Paperwork Reduction Act of 1980, however, to hold that these activities fell within its coverage. The Act, historically, is a successor to the Federal Reports Act, and like the latter, it is aimed at reducing the burden of paperwork required by the federal government for its own regulatory or statistical purposes. The preparation and preservation of MSDSs in the workplace have entirely different purposes. The object of these information disclosure requirements, in accordance with the OSH Act is to increase workplace awareness of hazards, thereby enabling workers to avoid injury, illness or death. Nothing in the Paperwork Reduction Act suggests a congressional intention to allow OMB, in the guise of regulating collection of information, the authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies.

OMB did not go so far as to disapprove the requirement that chemical manufacturers prepare and transmit MSDSs or the requirement that employers who purchase the chemicals make them available to their employees. It merely disapproved the requirement that on multi-employer worksites the employers exchange the MSDSs. In USWA I we questioned the basis of the Secretary's failure to include the construction industry in the hazard communication standard. 763 F.2d at 738. That industry is now included, and the problem of multi-employer worksites is endemic to it. OSHA reasonably concluded that the protection of one trade from hazardous substances used by another on the same jobsite required the

exchange of the hazard information. The exchange requirement no more constitutes the collection of information within the meaning of the Paperwork Reduction Act of 1980 than do the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers.

Our conclusion that the regulations disapproved by OMB do not involve the collection of information is reinforced by the statutory language which in two places disaffirms the intention to grant substantive lawmaking authority to OMB. 44 U.S.C. §§ 3504(a); 3518(e). Clearly, OMB cannot in the guise of reducing paperwork substitute its judgment for that of the agency having substantive rulemaking responsibility for such matters as drug or food labeling, drug package inserts, proxy statement disclosures, or the contents of registration statements. No substantive distinction between such disclosure requirements and the OSHA disclosure requirements disapproved by OMB in this instance is readily apparent.

III

OSHA and United Technologies, as intervenor, contend that we should nevertheless deny the petitioners' motion for additional relief. They contends that the petition should be construed as a challenge to OMB agency action under the Paperwork Reduction Act of 1980, cognizable only in a suits in a federal district court pursuant to the Administrative Procedure Act. 5 U.S.C. § 703. Alternatively they contend that because the three provisions which OMB disapproved were added to the hazard communication standard they do not involve our prior mandate, and can only be reviewed in a new challenge to OSHA rulemaking. We reject both contentions.

In USWA I we directed OSHA to reconsider the application of the hazard communication standard to employ-

ees in sectors of the economy other than manufacturing unless the Secretary could state reasons why such application would not be feasible. 763 F.2d at 739 (citing 29 U.S.C. § 655(b)(5)). In USWA I we made it clear that our first judgment required that feasibility be determined for each category of worker on the basis of the administrative record already compiled. 819 F.2d at 1270. Thus, our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside the manufacturing sector, by deciding whether or not they should be covered on the basis of the record. The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders. The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. *Cf. Action Alliance*, at 1455 (new round of rulemaking not required for a revision that is the "logical outgrowth" of the rulemaking record). Withdrawal of the provisions disapproved by OMB was accordingly inconsistent with those orders. Relief by motion in inappropriate. 28 U.S.C. § 1651(a) (1982); 5 U.S.C. § 706(1) (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977); *USWA II*, 819 F.2d at 1270.

IV

This panel has denied the motion by Associated Builders & Contractors, Inc. for a stay of the hazard communication standard. That motion was made in connection with a petition for review filed in the Court of Appeals for the District of Columbia, and transferred here. This petition appears to be an attempt to relitigate issues settled in our decisions in *USWA I* and *USWA II*. Since, however, briefing on that petition has not been completed we will not rule finally on it at this time. The clerk will be directed to issue a briefing schedule, and, when brief-

ing is complete, to assign the petition to a panel for disposition.

V

The Secretary shall forthwith publish in the Federal Register a notice that those parts of the August 24, 1987 hazard communication standard which were disapproved by OMB are now effective. Because the instant dispute arose as the result of another federal agency's attempt to exceed its statutory authority, we will deny at this time the petitioners' motion to hold the respondent officials of the Department of Labor in contempt.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-3554, 83-3562 & 83-3565
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC.,
Respondent

PUBLIC CITIZEN, INC., *et al.*,
Respondent

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC.,
Petitioner

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*, FISHER and KELLY, *District Judges* *

The petition for rehearing filed by the respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and

* As to panel rehearing only.

to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

/s/ John J. Gibbons
Chief Judge

Dated: November 28, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-3554, 83-3562 & 83-3565
84-3066, 84-3093 & 84-3128

UNITED STEELWORKERS OF AMERICA,
Petitioner

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC.,
Respondent

PUBLIC CITIZEN, INC., *et al.*,
Petitioner

v.

JOHN A. PENDERGRASS, ASSISTANT SECRETARY OF LABOR, ETC.,
Respondent

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*, FISHER and KELLY, *District Judges.**

The petition for rehearing filed by the intervenor, United Technologies Corporation, in the above entitled case having been submitted to the judges who partici-

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* As to panel rehearing only.

pated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

/s/ John J. Gibbons
Chief Judge

Dated: November 28, 1988

FILED
APR 3' 1989
JOSEPH F. SPANIOL, JR
CLERK

Nos. 88-1070, 88-1075, 88-1385 and 88-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

[Captions Continued on Inside Cover]

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Suite 1500 - North Lobby
Washington, D.C. 20004-1703
Telephone: (202) 637-3058

RICHARD M. HALL *
CHRISTOPHER H. MARRARO
LYDIA B. DUFF
SIVE, PAGET, & RIESEL, P.C.
1055 Thomas Jefferson Street, N.W.
Suite 501
Washington, D.C. 20007
Telephone: (202) 965-1500
Attorneys for Amicus Curiae National Association of Manufacturers

* Counsel of Record

Date: April 3, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., and UNITED TECHNOLOGIES CORP.,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

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Office of Management and Budget, Transcript of hearings on the *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communication Standard,* April 2, 1987 and October 16, 1987) 14, 18

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1070

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AND THE ASSOCIATED GENERAL CONTRACTORS OF VIRGINIA,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC., and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,

Petitioners,

v.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

No. 88-1385

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., and UNITED TECHNOLOGIES CORP.,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is associated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

Most of the NAM member companies are heavily regulated in many areas of their activities, at substantial expense to the member companies and to the consumers of their manufactured products. A significant portion of the expense is associated with a broad array of federal requirements to create, disseminate and keep records. Most of the regulation and recordkeeping requirements are not directly imposed on NAM members by statute; they are imposed principally by agency rules.

The members of NAM have been covered by a Hazard Communication Standard ("HCS") since 1983, and are not directly affected by the adoption of an HCS for non-manufacturers. However, the members of NAM are vitally affected by the Third Circuit's decisions undermining the procedural safeguards contained in the requirements of the Administrative Procedure Act ("APA") and the Occupational Safety and Health Act ("OSH Act") that agency rules only be adopted after notice and opportunity to comment. Likewise, NAM's members are adversely affected by the Third Circuit's restrictive interpretation of the Paperwork Reduction Act of 1980, a law which has benefited the productivity of American manufacturers by ameliorating the burdens of federally sponsored paperwork.

NAM therefore submits this brief as *amicus curiae*, with the consent of all parties, in support of the Petitions for Writs of Certiorari in order to assist the Court in evaluating the importance of the issues presented.

PRELIMINARY STATEMENT

These cases bring before the Court two major issues affecting the functioning of all federal administrative agencies. The first issue is whether the notice and opportunity to comment on a proposed HCS for manufacturers was sufficient under the APA and the OSH Act for the adoption of a final HCS for non-manufacturers. The second issue is the scope of the authority of the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1980 to reduce paperwork requirements imposed by the Occupational Health and Safety Administration ("OSHA"). Petitioners seeks writs of certiorari in connection with two cases decided by the Third Circuit. *Associated Builders and Contractors, Inc. v. Brook*, No. 88-1075 (3d Cir., Nov. 25, 1988) (a consolidation of four petitions for review of administrative action), and *United Steelworkers of Am. v. Pendergrass* (USWA III), 855 F.2d 108 (3d Cir. 1988).

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT HAS REDUCED THE MINIMUM PROCEDURAL STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT BELOW THE PARAMETERS ESTABLISHED BY CONGRESS AND THE SUPREME COURT. THIS REDUCTION WORKS A SUBSTANTIAL HARDSHIP ON INDIVIDUALS AND ORGANIZATIONS THAT PARTICIPATE IN REGULATORY MATTERS AND DIMINISHES THE QUALITY OF RULEMAKING.

The United States Court of Appeals for the Third Circuit violated the APA and the OSH Act in adopting an HCS for non-manufacturers without permitting OSHA to provide non-manufacturers with notice and an opportunity for comment beyond that afforded by the original notice applying an HCS to manufacturers in 1982. 42 Fed. Reg. 12,092 (1982). Insofar as that court's action is seen as allowing rulemaking without notice and comment, the decision is a novel departure from settled law [1], is at odds with other Circuits [2], works a substantial hardship on individuals and organizations who participate in regulatory matters, disserves the government agency seeking the views of the affected public, and is deserving of reversal by this Court.

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[1] *See American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 536-40 (1981) (OSHA must show each specific provision of safety standard contributed to increased safety); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 667 (1980) (plurality invalidated OSHA's benzene standard because of failure to explain how rule would benefit workers).

[2] *See, e.g., AFL-CIO v. Donovan*, 757 F.2d 330, 337-40 (D.C. Cir. 1985); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980); *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

A. This Court Should Resolve The Question of What Degree of Change Between Proposed and Final Rulemakings Triggers a Requirement For a New Proposal.

Both the APA and the OSH Act require OSHA to provide notice and opportunity for comment on proposed regulations before they become final. 5 U.S.C. § 553(b) (1982) and 29 U.S.C. § 655(b) (1982). Under order of the Third Circuit, OSHA published no proposed regulations on the application of an HCS to the non-manufacturer employers.

The Third Circuit justified its order prohibiting further notice by relying on its earlier decision in *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977) and similar decisions in the United States Court of Appeals for the District of Columbia. *See United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). Those lower court decisions established that a final rule may differ from the proposed rule where the change is a "logical outgrowth" of the rulemaking proceeding. 647 F.2d at 1221; *NRDC v. EPA*, 824 F.2d 1258, 1283 (1st Cir. 1987) (stating that substantial changes can be made "as long as the final changes are in 'character with the original scheme' and 'a logical outgrowth' of the notice and comment.")

The proper scope of this "logical outgrowth" concept is

> an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under the Administrative Procedure Act, 5 U.S.C. § 553, or similar provisions in new Acts of Congress for review of agency action.

Eli Lilly & Co. v. Costle, 444 U.S. 1096, 1096 (1980) (Rehnquist, J. dissenting on denial of petition for writ of certiorari). Chief Justice Rehnquist's statement is

prophetic: the issue has continued to grow in importance, lacking needed guidance from the Supreme Court. The Court should review this case to resolve the critical question of how much change in a proposed rule is permissible without a reproposal begore final promulgation.

The application of a standard to an entirely new group of industries cannot be deemed a "logical outgrowth" of a proposed rule which did not previously affect those industries. The impacts of an HCS on the construction and agricultural communities differ significantly from the impacts on the manufacturing community initially covered.[3] In addition to qualitative differences between the affected communities, the quantitative change effected by extending the HCS from manufacturers to non-manufacturers eliminates any logic in the growth of the standard without additional notice and opportunity to comment.[4]

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[3] The 230% average turnover rate in the construction industry and the outdoor nature of construction work contrast with the "prototypical manufacturing workplace, which is generally a stationary worksite with a relatively stable workforce." Comments of the Associated General Contractors of America, Oct. 23, 1987, attached as Appendix 5 to the Petition for Review of a Final Rule of the Occupational Safety and Health Administration, *Associated Gen. Contractors v. OSHA* (3d Cir.) (No. 88-1070), at 13a.

[4] The August 24, 1987 expanded rule applied an HCS, without notice and opportunity to comment other than that afforded in 1982, to 4,503,879 theretofore uncovered establishments with a total employment of 58,890,236, of which an estimated 18,391,096 employees are exposed in the workplace to hazardous chemicals. 52 Fed. Reg. 31,852, 31,871. OSHA estimated the cost of the application to non-manufacturing employers to be $687.2 million in the first year, with substantial additional costs each year thereafter. *Id.* at 31,873. Indeed, without the benefit of a notice of proposed rulemaking, OSHA may have seriously underestimated both coverage and cost impact of its new rule. For example, the Association of General Contractors testified before OMB that compliance in the construction industry would require 58 million man hours in the first year with costs for retraining at 38 million man hours for subsequent years. In contrast, OSHA estimated the costs at 34 million and 8 million respectively for all industries.

The final rulemaking extending the HCS to non-manufacturers is not a logical outgrowth of the initial standard and should have triggered a new proposal to allow comment since the non-manufacturers did not have "a fair opportunity to present their views on the contents of the final plan." 824 F.2d at 1283. The error of the Third Circuit in bypassing the APA and OSH Act notice and comment requirements for the entire non-manufacturing sector of the nation's industry provides an important opportunity for the Supreme Court to clarify the standards for re-proposal of proposed regulations.

B. The Practical Inability of the Public to Follow the Enormous Range of Rulemaking Activities Which May Potentially, But Not Expressly, Affect Them Makes a Clear Standard For Notice and Comment Imperative.

In addition to the unfairness to the non-manufacturers here, the practical consequences of the Third Circuit's decision for all future rulemakings are worrisome. "Agencies could in the future publish vague, ambiguous notices in the Federal Register, adverting obliquely to certain issues or proceedings, and then, months or years later, promulgate final rules and claim that constructive notice had been given." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 899 (D.C. Cir. 1978).

In each of the past five years, more than 3,000 proposed rules and 4,500 final rules have appeared in the Federal Register. Office of Management and Budget, Executive Office of the President, *Regulatory Programs of the United States Government, April 1, 1987 to March 31, 1988* 636.

Given this large number of federal rulemakings, those who are regulated and their associations, such as NAM, must limit the proposed rules that receive close attention.

When an agency announces, as OSHA did here,[5] that it will not adopt a standard for a class of the regulated community, members of that class typically pass on to other issues. Under the Third Circuit's rule, those excluded from regulation will nevertheless have to participate in rulemakings in which there is any shadow of an implication in the preamble that they might be included. This will lead to added expense and complexity for private and government parties.

The result for the courts is also worrisome. When an agency promulgates a final rule that excludes a sector of the regulated community and a review petition is filed, the seemingly excluded persons will have no choice but to intervene in the litigation to protect their interests. This will lead to unnecessary court interventions and will make such cases even more complex and burdensome.

Furthermore, the appropriateness, clarity, and efficacy of regulations which have not had the benefit of comments from all those potentially affected will be significantly diminished. "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data." *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). OSHA itself recognized the need for notice and comment so that the final regulation could accurately reflect the differences amnong the groups covered. OSHA stated that the HCS as developed "focused on existing practices and desirable implementation methods in manufacturing industries," and urged the Third Circuit to permit reproposing the regulations before applying them to non-manufacturers. Petition for Rehearing and Suggestion for Rehearing *En Banc* of the Secretary of Labor (No. 83-3554) at 9. The need for a reproposal is evident from the record before OMB. Confusion over issues of coverage, scope and practicality raised by participants at the OMB hearings easily could

[5] 47 Fed. Reg. 12,092, 12,101-12,102 (1982).

have been addressed and clarified through a rulemaking proposal.[6] The Third Circuit decision deprived the agency of the opportunity "to benefit from the expertise and input of the parties who file comments with regard to the proposed rule . . . ." *National Tour Brokers Assoc. v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

C. The Third Circuit Could Have Instead Imposed Detailed Time Deadlines on OSHA.

Whatever the frustrations of the labor organization petitioners with the pace of achieving their goal, the Third Circuit should not have meddled in agency procedure to speed up agency action.[7] The court could have imposed a reasonable time limit instead. The ability of courts to fashion remedies that achieve results without interfering with the agency's attempt to assure adequate notice and comment is amply demonstrated by the remand issued in *EDF v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988) (ordering EPA to adhere to a schedule for fulfilling its statutory obligations).

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[6] For example, The National Druggist Association raised legitimate questions as to whether capsules which contain powders or liquids were exempt from the rule noting that if they were not, an additional $3,400,320 in compliance costs would be incurred by druggists. October 16, 1987 hearing before OMB at 174. Similarly, the Small Business Administration testified that OSHA had underestimated the first year cost impact by over one billion dollars. Statement of Charles A. Cadwell, U.S. Small Business Administration before the Office of Management and Budget, Oct. 16, 1987.

[7] The Third Circuit's repeated references to the time intervals between agency actions and court proceedings indicates that the Third Circuit may also have shared in this frustration. *See United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 732 (3d Cir. 1985), and *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263, 1265, 1266, 1269 (3d Cir. 1987).

II. COURTS SHOULD NOT INTERFERE WITH AGENCY ACTIONS THAT ARE LAWFUL AND REASONABLE. REVIEW IS NEEDED IN ORDER TO MAKE CLEAR THE VITALITY OF THE DOCTRINES EXPRESSED BY THE SUPREME COURT IN *VERMONT YANKEE* AND *CHEVRON*.

The Third Circuit ignored the principles of judicial restraint enunciated in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). *Vermont Yankee* limited the courts' ability to interfere in the procedural actions of agencies. 435 U.S. at 555. The Third Circuit violated this precept in a novel context that needs review by the Supreme Court. *Vermont Yankee* restrained the judiciary from imposing procedural requirements on federal agencies in *excess* of those required by Congress. In the present case, the Third Circuit interfered with the agency's chosen procedure by imposing procedural requirements *less* than those required by Congress and selected by the agency.

By compelling OSHA to skip over the procedures required by the APA and the OSH Act, the Third Circuit violated the *Vermont Yankee* principle that courts should not interfere with agency actions permissible under statute. Even assuming *arguendo* that the notice afforded non-manufacturing employers in the 1982 rulemaking was in theory legally sufficient to allow OSHA to go directly to a final rule, under *Vermont Yankee* the Third Circuit should not have ordered the agency to abandon its choice to collect more information and undertake a notice and comment rulemaking. Indeed the force of the *Vermont Yankee* rule is all the greater when, as here, the agency seeks to give more procedural safeguards and thereby avoid statutory and even constitutional questions of fairness. *See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The Court should review this case to assert the vitality of *Vermont Yankee*. Surely it cannot be true, as one commentator has stated, that *Vermont Yankee* is "largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority." 1 K. Davis, Administrative Law Treatise 616 (2d ed. 1978), quoted and discussed in, Scalia *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 Sup. Ct. Rev. 345, 371 (1978). It is time for the Court to explain the authority and authoritativeness of *Vermont Yankee*. The Court should review this case to emphasize "that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee*, 435 U.S. at 524.

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND LIMITS IMPROPERLY THE AUTHORITY OF OMB UNDER THE PAPERWORK REDUCTION ACT TO MINIMIZE PAPERWORK BURDENS IMPOSED ON THE PUBLIC.

A. The Importance of the Paperwork Reduction Act to the Hazard Communication Standard.

The Paperwork Reduction Act of 1980 ("PRA") is the culmination of longstanding efforts by Congress[8] to "minimize the Federal paperwork burden for individuals, small businesses, state and local governments and other persons." 44 U.S.C. § 3501(a)(1). The critical need for this law was established by the Commission on Federal Paperwork, which concluded in its final report that federal paperwork requirements imposed annual costs of 25

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[8] The Paperwork Reduction Act was a "rewrite" of the Federal Reports Act of 1942, and was intended to "strengthen the clearance process" established under the prior law. S. Rep. No. 96-930, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U..S Code Cong. & Admin. News 6241, 6253.

to 35 billion dollars on private industry, and 8.7 billion dollars on individuals.[9] To minimize this formidable burden, Congress directed OMB to review all information requests proposed by agencies to determine whether such collection of information "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility." 44 U.S.C. § 3504(c)(3) (1982). The effectiveness of the PRA in ameliorating the burden on the public has been great. Between 1981 and 1986, agencies subject to PRA review have reduced the paperwork burden imposed on the public by over 560 million hours annually[10] or 44 percent of the burden that existed in 1980.[11] The Administration estimated that the paperwork burden on the public in fiscal year 1988 would decrease by 66.1 million hours, representing the seventh year of reduction by the federal government since 1981.[12]

OMB adhered closely to its lawful authority in reviewing OSHA's final HCS and, based on an extensive record and detailed consultation with the agency, disapproved three limited provisions in the rule.[13] OMB's disapproval

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[9] *Final Summary Report of The Commission on Federal Paperwork* 5 (1977).

[10] March 10, 1988 Letter from James C. Miller III, Director, Office of Management and Budget, to President Ronald Reagan transmitting the Administration's Information Collection Budget for Fiscal Year 1988, 1.

[11] Executive Office of the President, Office of Management and Budget, *Regulatory Programs of the United States Government, April 1, 1987-March 31, 1988*, 1-1i.

[12] *See* March 10, 1988 letter from James C. Miller III, 1. According to the letter a net increase of approximately 140 million hours resulted from three federal statutes enacted in 1987.

[13] The Third Circuit, in ordering the Secretary to proceed directly to a final rule without the benefit of a notice of proposed rulemaking prevented OSHA from complying with 44 U.S.C. § 3504(h). That

of the requirement that material safety data sheets ("MSDSs") be exchanged by each employer at multi-employer worksites was based solely on the determination that such requirement "does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces." [14] OMB also disapproved the overly narrow scope of the exemption for consumer products, stating, "the record indicates that this exemption would continue to place under the HCS large number of consumers for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial." [15]

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section requires an agency to notify OMB not later than publication of notice, of any proposal rule which includes a collection of information requirement. This important procedural requirement, sponsored by Senator Kennedy as Amendment 1177 of the Senate Judiciary Committee, is intended to coordinate Executive review of collection of information requirements in agency rulemakings with regulatory oversight by the Executive Office of the President by providing the agency an opportunity to respond to OMB comments. *See* Remarks of Senator Edward Kennedy, 126 Cong. Rec. 14,689 (daily ed. Nov. 19, 1980). Thus, the Court's short-circuiting of the APA also thwarted the critical interagency deliberative process required by the Kennedy Amendment.

[14] October 28, 1987 letter from Wendy L. Gramm, Administrator for Information and Regulatory Affairs, Office of Management and Budget, to the Honorable Thomas C. Komarek Assistant Secretary for Administration and Management, Department of Labor, disapproving the collection of information requests in the final HCS. The record is replete with examples where trade groups demonstrated in testimony before OMB that this provision of the HCS had no practical utility. These same groups provided numerous alternatives which would accomplish the same objective of workplace hazard communication without the full paperwork burden imposed by the rule. *Id.* at 7-9. *See also* October 28, 1988, "Comments and Request for Hearing by the Construction Industry Hazard Communication Coalition Proposed Revisions to OSHA Hazard Communication Standard" (53 Fed. Reg. 29,821), submitted to OSHA Docket Officer at 17-19.

[15] Letter of Gramm to Komarek at 8. The OMB record illustrated how OSHA's limited consumer product exemption (29 C.F.R.

OMB disapproved a third provision of the final HCS that would have exempted FDA regulated drugs to the extent that they are in "solid, final form for direct administration to patients." 29 C.F.R. §§ 1910.1200(b)(6)(viii)(1988). The OSHA exemption did not exclude drug capsules containing liquids or particles. The narrow scope of the exemption resulted in drug wholesalers initially having to distribute 4.8 million MSDSs despite the fact that a professional package insert of comprehensive hazard information is already included in "every single package of a prescription drug in this country." [16]

B. The Petition Should be Granted To Resolve the Conflict Between the Third and D.C. Circuits and to Reestablish the Director's Intended Role in Regulating the Paperwork Burden Imposed by Administrative Agencies.

The Third Circuit erred in ruling that the HCS requirement to collect and distribute MSDSs does not come within the reach of the PRA and that, because the recordkeeping requirement had a regulatory purpose under the OSH Act, it was exempt from PRA review. These two rulings misinterpret the law and undermine the important powers given to OMB. The Court should take this case so that OMB can fulfill its congressional man-

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§ 1910.1200(b)(6)(vii)) lacks practical utility. Under the OSHA exemption employers could not discern when the exemption would apply. Witnesses before OMB testified that this flaw would lead to exaggerated overcompliance causing a substantial paperwork burden involving the maintenance of MSDSs. Moreover, hazard information on consumer products was duplicative of that required by the Consumer Product Safety Commission. Transcript of OMB hearings on the *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communications Standard*, Oct. 16, 1987, at 90, 148-52.

[16] Testimony before OMB of the National Wholesale Druggists Association. *Paperwork Requirements of the Occupational Safety and Health Administration Hazard Communication Standard, supra* note 15, at 168-79

date to limit paperwork requirements imposed on members of NAM without significant public benefit.

The D.C. Circuit has interpreted the PRA's predecessor, the Federal Reports Act of 1942 (codified at 44 U.S.C. § 3501-3520 (1976)), to apply to the collection of all information required by a federal agency for any regulatory purpose, whether or not the information is furnished directly to the agency. *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988). The D.C. Circuit Court rejected arguments that the Federal Reports Act applied only to documents furnished to an agency. Interpreting the PRA, the court wrote that "under the Paperwork Act . . . OMB holds the same substantive power as it did under the [Federal] Reports Act. Where it determines that collection of information is unnecessary, the Agency may not proceed with the collection." *Id.* at 1453. The Court continued "[a]ppellants cannot seriously believe . . . Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; it is the record-keeping and data-gathering that constitute the burden." *Id.*

The attempt by the Third Circuit to distinguish *Action Alliance* and thus avoid the conflict is unsuccessful. The D.C. Circuit quoted the paperwork requirement that OMB lawfully disapproved: a " 'written self-evaluation of [the federal fund recipients'] compliance under the [Age Discrimination] Act' . . . [and a] self evaluation available on request to the agency *and to the public*." *Id.* at 1452 (emphasis added, citations omitted). This requirement is little different from the HCS requirement that the MSDSs be made available to employees and "upon request, to . . . the Assistant Secretary [of Labor] . . . ." 29 C.F.R. § 1910.1200(g)(11) (1988).

The Third Circuit's decision is also inconsistent with the PRA's legislative history [17] and, without so much as

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[17] The Senate Report includes within the coverage of the PRA information collected for purposes of disclosure to the public. The

a mention, rejects the OMB interpretation of the PRA. OMB's regulations, which were promulgated on March 31, 1983, define the "collection of information" as:

> the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, *or publicly disclose information.*

5 C.F.R. § 1320.7(c) (1988) (emphasis added). Subsection (2) of Section 1320.7(c) further provides, in part, that:

> *Requirements* by an agency, a person *to obtain or to compile information for purpose of disclosure to members of the public* at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency.

(Emphasis added). Thus, the Third Circuit, without explanation, rejected a "permissible construction" of the

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Senate Report addreses public disclosures required by the Securities and Exchange Commission stating, "In this connection, federally mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purpose of the Federal Securities Laws." S. Rep. No. 96-930, 96th Cong., 2d Sess. 39, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6279. This view was reiterated by Sen. Chiles, the Sponsor when Congress considered amendments to the PRA in 1984. He explained:

> [t]he notion that the law was dedicated primarily to forms, questionnaires and surveys 'and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally sponsored collections of information' is a fundamental misreading of what the law states [and] what Congress in 1980 intended. . . .

S. Rep. No. 576, 98th Cong., 2d Sess. at 43.

statute by the administering agency, contrary to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984).

The Third Circuit also mistakenly and substantially narrowed the scope of the PRA by ruling that 44 U.S.C. § 3518(e) (1982) prevents OMB from performing its statutory function with respect to paperwork requirements when the rulemaking "embodies substantive policy decision-making entrusted to the other [non-OMB] agency." *United Steelworkers of Am. v. Pendergrass*, 855 F.2d 108, 112 (3d Cir. 1988). This determination also conflicts with the D.C. Circuit. *Action Alliance*, 846 F.2d at 1454-55. While there may on occasion be tension between OMB duties with respect to paperwork requirements under the PRA and another agency's duties under another law, the Third Circuit's meat ax approach—OMB always looses—"carve[s] so large a slice from OMB authority" that it calls for review and adjustment by the Supreme Court. *Action Alliance*, 846 F.2d at 1455.

The plain language of the PRA shows that Congress vested sole authority in OMB to determine whether a proposed paperwork requirement imposed by a federal agency is necessary or useful in achieving a substantive policy. Under the goal of ensuring that rules of federal agencies minimize the information burden on the public, Congress ordered federal agencies "not to conduct or sponsor the collection of information unless, . . . (3) the Director has approved the proposed information collection request . . . ." 44 U.S.C. § 3507(a) (1982). Congress then directed that the function of the Director to clear information collection requests shall include a determination of whether a collection of information request "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility . . . ." 44 U.S.C. § 3504(c)(2) (1982). There is nothing in the PRA that terminates this authority merely because the agency or anyone else claims that the information collection request also has a

direct regulatory function. *Action Alliance*, 846 F.2d at 1455.[18]

OMB acted on a well-developed record and after detailed consultation with OSHA. OMB carefully focused its activities *only* on requirements for the collection of information and restricted its disapproval to such requirements, leaving intact the underlying regulatory approach of OSHA. The disapproved provisions involve the collection and maintenance for purposes of public disclosure and recordkeeping of hundreds, thousands, and in some cases millions of pages of material safety data sheets,[19] precisely the area of concern at which the PRA is aimed. The Court should grant the petitions to assure OMB's ability to control such excessive and costly paperwork requirements affecting NAM and all members of the public.

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[18] The Third Circuit paid little attention to relevant legislative history when it construed § 3518(e) to deny the Director of OMB the authority to review agency rules. Prior to and during consideration of the PRA, Congress understood the Executive already to have the authority to intervene on substantive points of other agency rulemakings. *See* Pub. L. No. 94-78, § 4 (August 9, 1975) amending The Council on Wage and Price Stability Act, Pub. L. No. 93-387 (August 24, 1974).

[19] *See* OMB Docket 1218-0072 including written submissions accompanying April 2, 1987 and October 16, 1987 transcript of public hearings. For example the Small Business Administration estimated that a typical plumber must maintain 500 MSDSs compared with OSHA's estimate of 12. Ex. 2-21 (October 16, 1987). One contractor from Minnesota estimated that 55 file cabinets to maintain MSDSs may be required at a typical construction high rise site. Oct. 16, 1987, Transcript at 109.

CONCLUSION

For these reasons, and upon the entire record, the petitions for writs of certiorari should be granted in both *Associated Builders and Contractors, Inc. v. Brock* and *United Steelworkers of Am. v. Pendergrass* (USWA III).

Respectfully submitted,

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Suite 1500 - North Lobby
Washington, D.C. 20004-1703
Telephone: (202) 637-3058

Date: April 3, 1989

RICHARD M. HALL *
CHRISTOPHER H. MARRARO
LYDIA B. DUFF
SIVE, PAGET, & RIESEL, P.C.
1055 Thomas Jefferson Street, N.W.
Suite 501
Washington, D.C. 20007
Telephone: (202) 965-1500
Attorneys for Amicus Curiae National Association of Manufacturers

* Counsel of Record

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Nos. 88-1434 and 88-1075

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,
v.
UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

ASSOCIATED BUILDERS AND CONTRACTORS, INC. and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
Petitioners,
v.
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE BUSINESS COUNCIL ON THE REDUCTION OF PAPERWORK AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

CLARK R. SILCOX *
STEELE & FORNACIARI
2020 K Street, N.W., Suite 850
Washington, D.C. 20006
(202) 887-1779
Attorneys for Business Council on the Reduction of Paperwork

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC. and the CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS,
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THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE BUSINESS COUNCIL ON THE REDUCTION OF PAPERWORK AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

The Business Council on the Reduction of Paperwork ("BCORP") respectfully submits this brief as amicus curiae in support of the petitions for writ of certiorari

filed by the petitioners, Elizabeth Dole, Secretary of Labor, and the Associated Builders and Contractors, Inc. and Construction Industry Trade Associations.[1] Pursuant to Supreme Court Rule 36.1, the parties have consented to the filing of this brief. BCORP has filed their written consents with the Clerk.

INTEREST OF THE AMICUS CURIAE

The Business Council on the Reduction of Paperwork ("BCORP") is a non-profit, non-partisan association whose basic purpose is to assist the federal government, business entities and not-for-profit research institutions in maximizing the value and meaningfulness of federally generated data and records, while minimizing the burden of federally sponsored reporting and recordkeeping. BCORP's membership consists of twenty-nine national and regional trade associations, and sixty individual business and educational organizations. Through its trade association members, BCORP reaches out to thousands of other small and large enterprises to inform and to involve them on issues involving the burden and practical consequences of regulatory reporting and recordkeeping requirements. Many BCORP members are adversely affected by this ruling.

BCORP is the successor to the Advisory Committee on Government Questionnaires which was originally organized in 1942 at the request of the Director of the Bureau of the Budget in response to the enactment of the Federal Reports Act, ch. 811, 56 Stat. 1078 (1942). The Advisory Committee was later renamed the Advisory Council on Federal Reports ("ACFR"), and following the

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[1] This brief addresses only the question presented under the Paperwork Reduction Act which is the sole question addressed by the Secretary of Labor in the gaovernment's petition in No. 88-1434. It is one of four questions presented by Petitioners in No. 88-1075. Petitioners in 88-1075 raise additional questions for review which are not addressed by *amicus curiae* in this brief.

enactment of the Federal Advisory Committee Act in 1972 (86 Stat. 770), 5 U.S.C.A., Appendix 2 § 1 *et seq.* (1967), which terminated the existence of numerous federal advisory committees (such as ACFR) whose charters were not expressly renewed, ACFR reorganized as the Business Advisory Council on Federal Reports ("BACFR"). BACFR's stated purpose was to advise the Director of the Office of Management & Budget ("OMB") and the Comptroller General of the United States, consistent with their respective statutory responsibilities under the Federal Reports Act, in coordinating the information—collecting services of the federal agencies with a view to minimizing the burden upon business enterprises, reducing the cost of government, and improving the quality or federally sponsored data collection and recordkeeping programs. In 1986, the association's name was changed to BCORP to reflect the national mandate established by Congress to bring about the *reduction* of unnecessary paperwork. BCORP is now the single private organization devoted exclusively to this purpose.

BCORP's interest in the present dispute is more than academic. This is a case of enormous economic significance, not only to BCORP's membership, but to the commercial and research sectors of our economy and the public generally. The rule of law established by this case threatens to exempt from OMB review under the Paperwork Reduction Act of 1980 ("PRA") many unnecessary, federally mandated recordkeeping requirements with the effect of disrupting the Congressional goal of reducing paperwork burden. The court of appeals ruling lays open to challenge all OMB decisions under the PRA when those OMB decisions are based and articulated solely in terms of reducing paperwork burden. The ruling in this case will curtail, by judicial fiat, the congressional objective of *reducing* the burden of federally mandated recordkeeping and reporting by eliminating OMB clearance of agency rules and thus imposing costs on BCORP's mem-

bers and the nation's businesses that might have been avoided as Congress intended.

BCORP has another interest in this suit. One of the fundamental improvements which the PRA, 44 U.S.C. § 3501 *et seq.*, made to the old Federal Reports Act is the public participation provisions now codified in §§ 3507(a), 3508 and 3517 of Title 44 of the U.S. Code whereby the Director of the OMB must give interested agencies and perpersons a "meaningful opportunity to comment" before determining whether the "collection of information" by an agency is "necessary for the proper performance of the functions of the agency." As noted by the Senate Governmental Affairs Committee in the Senate Report accompanying S. 1411, which became the PRA, BCORP's predecessor-in-name:

> The Business Advisory Council on Federal Reports (BACFR) has monitored the operations of the Federal Reports Act throughout the Act's history. The Council stressed to the Committee the value of increased public awareness and participation. As a result of their comments on S. 1411, the Committee has taken additional steps to provide a meaningful opportunity for public involvement.

S. Rep. No. 96-930, 96th Cong., 2d Sess. 16 (1980). In this case, BCORP petitioned OMB to hold hearings on OSHA's Hazard Communication Standard ("HCS") to hear the views of the public on this significant new federal recordkeeping requirement, and OMB held hearings. BCORP, some of its members, OSHA, and other interested parties participated in those hearings and shared their views on the paperwork burden issue posed by the HCS as well as the revised HCS when it was extended to the non-manufacturing sector. In granting the motion of the United Steelworkers of America and Public Citizen, Inc. from which the present dispute arises, the Third Circuit effectively ruled that public hearings on the paperwork burden posed by the recordkeeping require-

ments of the revised HCS should never have been held at all.[2] This result undermines the nation's effort to involve both the public and the agencies in the paperwork reduction process so that all interested parties can evaluate the need for information and the cost attributable to collecting, maintaining and disseminating it.

BCORP submits this brief on behalf of all of its members as *amicus curiae* in support of the Petitions for Writ of Certiorari to inform the Court of the importance of the issue presented.

PRELIMINARY STATEMENT

Petitioners seek a writ of certiorari in connection with a decision of the Third Circuit Court of Appeals. *United Steelworkers of America v. Pendergrass ("USWA III")*, 855 F.2d 108 (3rd Cir. 1988). This case addresses the authority of OMB under the PRA to review whether an agency (OSHA) has met its responsibility under the PRA to reduce the burden of paperwork recordkeeping requirements imposed by the HCS. The impact of this case extends far beyond OSHA and the revised HCS which is the subject of this suit. It affects many other disclosure-oriented recordkeeping requirements which federal agencies are now promulgating and will likely promulgate in the future. First, the Third Circuit held that OMB "second-guessed" the "substantive policy decision making entrusted to [OSHA]," and lacked authority to do so. The holding is erroneous, and the logical extension of the court of appeals' reasoning is not limited to OSHA, but has significance for OMB review of all other agency actions under the PRA. Second, the Third Circuit held

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[2] Like the Petitioner, amicus notes that the Paperwork Reduction Act issue was before the court on a motion to hold the Secretary of Labor in contempt of the Third Circuit's prior order in *United Steelworkers of America v. Pendergrass ("USWA II")*, 819 F.2d 1263 (3rd Cir. 1987) for submitting the revised HCS to OMB for review in the first place.

that the specific provisions of the HCS which were disapproved by OMB did not "require the collection of information" and therefore they were not subject to OMB review under the PRA. This holding is equally erroneous, and it threatens to eliminate from OMB review all federally mandated *recordkeeping* requirements simply because the data in the records may, but do not necessarily have to be reported back to a federal agency.

REASONS FOR GRANTING THE PETITION

Information is a valuable economic resource; it is valuable to government, business enterprises, workers, and consumers. Like any other economic resource, there is a cost in acquiring information, there is a cost in maintaining information, and there is a cost in distributing information. These costs naturally affect the cost of government, the cost of doing business, and the cost of bringing goods and services, public or private, to the public.[3]

Just as they would treat any other economic resource, businesses, workers, and consumers tend to acquire, distribute, and receive information in the most efficient manner they know.[4] In enacting the Federal Reports Act and the PRA, Congress recognized that the federal government should set efficiency in the collection, maintenance, and dissemination of information as a national

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[3] This Court has recognized this fact in another context. *See FTC v. Indiana Federation of Dentists,* 106 S.Ct. 2009, 2019 (1986) ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost-justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market * * *"). *See also Virginia Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 763-65 (1976).

[4] G. STIGLER, THE ECONOMICS OF INFORMATION and INFORMATION IN THE LABOR MARKET in THE ORGANIZATION OF INDUSTRY 171 and 191 (1968).

objective when it was required by the federal government. 44 U.S.C. § 3501. The PRA itself set an immediate objective of *reducing* the existing burden of Federal collection of information within three years by twenty-five percent. 44 U.S.C. § 3505(1). The need for this legislation was a response to the finding of the Federal Paperwork Commission which estimated in 1977 that the cost of Federal Paperwork requirements then amounted to $100 billion a year, about $500.00 for every man, woman and child. S. Rep. 96-930, 96th Cong., 2d Sess. 3 (1980). The Paperwork Reduction Reauthorization Act of 1986 set a further goal of reducing the burden of Federal collections of information by at least 5 percent in each of fiscal years 1987, 1988 and 1989. 44 U.S.C. § 3505(4).

In its most recent report to the President, OMB estimated that the public will spend almost 2 billion hours in fiscal year 1988 complying with federal information collection requests.[5] Sixty-three percent of the burden falls on business and other institutions.[6] In the same report, OMB reported that in every year but fiscal year 1987 OMB has actually been able to reduce paperwork burden: from 1981-1987 OMB was able to reduce that burden by an aggregate of 560 million hours pursuant to its authority under the PRA.[7]

OMB, through its Office of Information and Regulatory Affairs (OIRA), is charged with the responsibility of administering the PRA. 44 U.S.C. § 3503. Additionally,

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[5] Office of Management and Budget, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT 1 (March 10, 1988). The figure may actually be much higher. The I.R.S. recently released a report stating that the taxpayer paperwork burden alone was 5.3 billion hours. A.D. LITTLE & CO., STUDY FOR THE INTERNAL REVENUE SERVICE ON TAXPAYER PAPERWORK BURDEN (August 31, 1988).

[6] Office of Management and Budget, *id.* at 14.

[7] *Id.* at 4.

each federal agency is responsible for "complying with the information policies, principles, standards, and guidelines prescribed by the Director" of OMB. 44 U.S.C. § 3506(a). The Director of OMB is granted express authority to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. § 3516.

Within the framework of the PRA, it is initially the responsibility of each federal agency to determine the agency's "need for the information" and estimate the burden that will result from the information collection request. 44 U.S.C. § 3507(a). OMB then fulfills its statutory mission to minimize the cost of collecting, maintaining and disseminating information, under the statutory grant of authority contained in 44 U.S.C. §§ 3504(a), 3504(c), 3507(a) and 3508 by reviewing an agency's "information collection requests"; in other words, reviewing whether an agency has met its statutory responsibilities under the PRA:

> **§ 3504. Authority and functions of Director.**
>
> (a) The Director shall develop and implement * * * and oversee the review and approval of information collection requests, * * * The authority of the Director under this section shall be exercised consistent with applicable law.
>
> (c) The information collection request clearance and other paperwork control functions of the Director shall include—
>
> (1) reviewing and approving information collection requests proposed by agencies;
>
> (2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency.

§ 3507. Public information collection activities-Submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information—

* * * *

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

§ 3508. Determination of necessity for information; hearing

Before approving a proposed collection request, the Director shall determine whether the collection of information by an agency *is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.* Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency *is unnecessary, for any reason, the agency may not engage in the collection of the information.* (Emphasis supplied).

The relationship between a federal agency and OMB under the PRA is also set out in 44 U.S.C. § 3518:

§ 3518. Effect on existing laws and regulations

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

* * * *

> (e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

Under this statutory framework, Congress has clearly "subjected" the federal agencies to the power vested in OMB and the Director of OMB to determine whether a collection of information by an agency is "necessary for the proper performance of the functions of the agency." No other construction of Sections 3506(a), 3507(a), 3508 and 3518(a) is possible.

In *USWA III*, the Third Circuit, after reciting only two of the above-quoted statutory provisions (§§ 3504(a) and 3518(e)), held:

> Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either: (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

I. Review Is Necessary To Resolve A Conflict Among The Circuits Over What Constitutes A "Collection Of Information" Under The PRA.

Action Alliance of Sr. Citizens of Philadelphia v. Bowen, 846 F.2d 1449 (D.C. Cir. 1988) involved a challenge to OMB's decision under the old Federal Reports Act to eliminate an HHS requirement that a recipient of federal funds under the Age Discrimination Act complete a written self-evaluation of its compliance under the Act and to make such self-evaluations available

on request to HHS *and the public.* The D.C. Circuit rejected as "pure pettifoggery" appellant's objection that because the recipients were not required to submit their written self-evaluation to an agency that it did not constitute a "collection of information." The D.C. Circuit admonished (846 F.2d at 1453-54):

> Appellants cannot seriously believe that in enacting the Reports Act, Congress was concerned solely or primarily with private parties' costs of mailing data to Washington; *it is the record-keeping and data-gathering that constitute the burden.* Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be *used or be available for use* in the collection of information." (Emphasis in original).

In contrast, the Third Circuit in this case read both the Federal Reports Act and the PRA more narrowly (855 F.2d at 113):

> The [PRA], historically, is a successor to the Federal Reports Act, and like the latter, it is aimed at reducing the burden of paperwork required by the federal government *for its own regulatory or statistical purposes.* (Emphasis supplied).

The Third Circuit purported to sidestep the holding of *Action Alliance* on the grounds that the OSHA regulation at issue[8] did not require the employer to "compile" information but merely to transmit it or disclose it to employees. The PRA is not so narrow and it regulates agency rules which require persons to maintain information for disclosure to members of the public or the

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[8] Specifically, the requirement that employers at multi-employer workplaces maintain or provide to other employers at the workplace a MSDS for each hazardous chemical. 29 C.F.R. § 1910.1200 (e)(2).

public-at-large. An "information collection request" is defined broadly to include not only report forms and questionnaires but a "collection of information requirement or similar method calling for the collection of information." 44 U.S.C. § 3502(11). The "collection of information" is likewise defined broadly to include "the obtaining or soliciting of facts * * * through the use of * * * identical recordkeeping requirements imposed on ten or more persons * * *" 44 U.S.C. § 3502(4). A "recordkeeping requirement" is a "requirement imposed by an agency on persons to *maintain* specified records." 44 U.S.C. § 3502(17).

Under the foregoing authority, OMB disapproved of only three aspects of the revised HCS. First OMB disapproved of the requirement that employers at multi-employer worksites maintain and exchange among themselves (or maintain at a central depository) the Material Safety Data Sheets (MSDS) on hazardous chemicals. The MSDS required by the HCS to be maintained by all employers is clearly the obtaining of facts through the use of a recordkeeping requirement to maintain specified records. As the underlying OSHA regulation requires:

> (8) The employer shall *maintain* copies of the required material safety data sheets for each hazardous chemical in the work place, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Emphasis supplied).

29 C.F.R. § 1910.1200(g)(8).[9]

Secondly, OMB effectively disapproved of the entire revised HCS insofar as it failed to *expand* the exemptions for consumer products and FDA regulated drugs

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[9] The rule applicable to multi-employer worksites, 29 C.F.R. § 1910.1200(e)(2)(i) likewise contemplates that employers will maintain MSDS's at their own offices or at a central location in the workplace.

where there were pre-existing, duplicative disclosure requirements. The Third Circuit, overlooking the fact that it is the HCS which calls for the "collection of information," mistakenly confused the issue and concluded that "exemptions from labelling requirements which would otherwise be duplicative" cannot be a "collection of information." *USWA III* at 112. This mistake in perception led the court of appeals to hold that these two OMB disapprovals were improper as well. Since it is the HCS (not the exemption) that constitutes an information collection request, OMB's recommendation of an *expanded exemption* from the information collection requirements of the HCS to avoid duplication in these two instances is properly a "disapproval."

OMB's own regulations implementing the PRA, 5 C.F.R. § 1320, are consistent with the clear reading of the PRA and with the legislative history. As the Senate Report commented, "Information *maintained*, as opposed to directly provided by Federal agencies, is therefore subject to the clearance requirements for collections of information set forth in Section 3507." S. Rep. No. 96-930, 96th Cong., 2d Sess. 38 (1980). Furthermore, both the Senate Report and the House Report confirm that "information is also collected to form the basis for *disclosure to the public*." [10] Thus OMB relies on sound legislative authority when it explains that the "obtaining or soliciting of information" by an agency "includes any requirement or request for persons to *obtain, maintain*, report or *publicly disclose information*." 5 C.F.R. § 1320.7(c) (emphasis supplied). Furthermore, "Requirements by an agency for a person [employer] to obtain [an MSDS from a chemical manufacturer] for the purpose of disclosure to members of the public [employees] through posting, notification, labeling, or similar disclosure requirements constitute the 'collection of informa-

[10] S. Rep. No. 96-930, 96th Cong., 2d Sess. 39-40 (1980). *Accord* H.R. Rep. No. 96-835, 96th Cong., 2d Sess. 23 (1980).

tion' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency." 5 C.F.R. § 1320.7(c)(2). This rule is entirely consistent with the purpose of the PRA "to minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information," 44 U.S.C. § 3501(2), insofar as OMB has determined that the collection, maintenance, and dissemination of information is more efficiently handled by private persons instead of the Government itself.

Both the express language of the PRA and the OMB regulations promulgated thereunder do not limit the PRA's scope to some narrow version of the word "compile" for the government's own regulatory or statistical purposes. In taking that narrow course, the Third Circuit brought itself squarely into conflict with the D.C. Circuit's view that the "collection of information" encompasses "any general or specific requirement for the . . . maintenance of records . . . which are to be . . . available for use in the collection of information." *Action Alliance, supra* at 1454.[11]

More seriously, the Third Circuit totally ignored this Court's rule for reviewing an agency's construction of a statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of

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[11] It is not a point of distinction that *Action Alliance* was decided under the Federal Reports Act. The legislative history is unequivocal that the Federal Reports Act was "strengthened" by the PRA, and one "feature of the [PRA] which strengthen[ed]" and "clarified" the Federal Reports Act was to specifically include "recordkeeping requirements" in the definition of "collection of information." S. Rep. No. 96-930 at 13.

> Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). While the intent of Congress in this case is clear and OMB has adhered to it, it is equally clear that OMB has engaged in a permissible construction of the PRA. Thus, under this Court's *Chevron* ruling, the Third Circuit has erroneously imposed its own construction on the PRA.

II. Review Is Necessary To Resolve An Issue Of Major Economic Significance Concerning The Authority Of OMB To Reduce The Cost Of Federally-Required Recordkeeping Requirements.

It is an essential observation that OMB's decision under the PRA in this case is based on and articulated *solely* in terms of paperwork burden and practical utility. (Pet. 31a, 34a-35a, 37a).[12] OMB cited examples how the OMB-disapproved provisions were duplicative of other federal information requirements (Pet. 33a, 36a, 37a), and made recommendations about less burdensome alternatives. (Pet. 32a, 42a). One thing is for certain about the OMB decision in this case: on its face there is absolutely nothing to suggest that OMB's decision "embodies substantive policy decision making entrusted to [OSHA]." Indeed, the Third Circuit tacitly acknowledged this fact and concluded, without citing any fact or reason, that OMB had some hidden substantive agenda when it acted in the "guise of reducing paperwork." *USWA III* at 113.

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[12] References herein to "Pet. ——" are to the Secretary of Labor's petition for certiorari in No. 88-1434, Appendix E.

The court of appeals accused OMB of "second-guessing" OSHA's policymaking, and held that OMB was without authority to do so, citing 44 U.S.C. §§ 3504(a) and 3518 (e), but the Third Circuit's exclusive reference to these provisions of the PRA selectively misinforms the role intended for OMB by Congress.[13] The very language of § 3508 instructing OMB to "determine whether the collection of information is *necessary* for the *proper performance of the functions of the agency*" necessarily means that OMB will have to contemplate the agency's substantive role and functions in assessing whether the collection of information is "necessary." At a minimum, the very word "necessary" envisions that there will be some "second guessing" of an agency's action by OMB. Consequently, the mere fact that OSHA's policymaking in this case concerned the disclosure of information to workers does not remove a disclosure-oriented record-keeping requirement from OMB's jurisdiction. Instead, it is merely one of the factors that OMB might consider in determining whether the collection of information is "necessary."[14] The Senate Report confirms that it was

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[13] Sections 3504(a) and 3518(e) were two of three "safeguards" incorporated in the PRA to be sure there was no dilution in the independence of agencies. S. Rep. 96-930, 96th Cong., 2d Sess. 15 (1980). Section 3518(e) was simply a statement of belief that "the bill shall not affect in any way the existing authority of * * * OMB with respect to the substantive policies and programs of departments and agencies." *Id.* In the words of the statute, OMB's authority was neither increased nor decreased, but OMB was clearly charged under § 3508 with the authority to determine whether an information collection request was necessary.

[14] The Director of OIRA clearly perceives such a balancing act for her role. "While the Act's underlying goal is to minimize the Federal Paperwork burden on the public, the [PRA] also recognizes the need to weigh the burdens of the collection on the public against the needs of the agency." *Paperwork Act Oversight: Internal Revenue Service Forms W-4 and W-4A, Hearing Before the Subcommittee on Federal Spending, Budget and Accounting, Senate Committee on Governmental Affairs*, S. Hrg. 100-75, 100th Cong., 1st Sess. 30 (1987) (Statement of Wendy L. Gramm).

ultimately the responsibility of the Director of OMB to determine an agency's need:

> *Necessity is thus the test under this section.* This determination is to include whether the collection of information: (1) has practical utility for the agency, (2) is not more than the minimum needed to meet the agency's objective, or (3) is not duplicative of similar information otherwise accessible. *If the Director determines that a collection is not necessary, he should not approve it.* The Director is authorized to give the agency and other interested persons an opportunity to be heard or to submit statements in writing before making a determinaton. *Unless the collection of information is specifically required by statutory law the Director's determination is final for agencies which are not independent regulatory agencies.*

S. Rep. No. 96-930, 96th Cong., 2d Sess. 49 (1980).

Congress knew that it had given significant authority to the Director of OMB under the PRA and it saw itself as the ultimate overseer of the Director's conduct in determining necessity.

> The Congress itself has the responsibility and must ultimately ensure that the authority granted to the Director of OMB by this Act over both Executive branch and independent regulatory agencies and the override authority is not abused. As the history of the original Federal Reports Act demonstrates, the Congress always has the prerogative and capability to change those authorities.

Id. at 16.

At the time it enacted the PRA, Congress was aware that in some cases there would be a "close relationship between policy making and information management." H.R. Rep. No. 835, 96th Cong., 2d Sess. 23 (1980). However, the legislators felt that the agencies should be capable of justifying "their need for information used to

establish policy or for other purposes." *Id.* As a practical matter, OMB demonstrated a certain solicitude for OSHA's needs in this case and suggested further rulemaking by OSHA on the HCS to justify its need for other portions of the HCS. (Pet. 38a-44a). This is hardly a case of "political interference" which concerned some members of Congress and prompted the enactment of the safeguards. It is a classic case of how the PRA was intended to work.

It cannot be ignored that the PRA was enacted for the protection of the public, and in centralizing the clearance process in OMB Congress deliberately modified the practice under the Federal Reports Act in which some agencies were accountable to no one and review was otherwise divided between OMB and the General Accounting Office. Congress deliberately chose to hold one agency accountable to it for achieving the objectives of the PRA. No section of the Act is more revealing of this purpose than Section 3512.[15] Although not directly implicated by the facts in this case, the spirit and intent of Section 3512 is clearly offended by the Third Circuit's ruling. Enacted for the protection of the public, Section 3512 requires that an OMB control number be assigned to each information collection request. That control number is a symbol to the American public "indicating that the Director of OMB is the acountable individual in government to be sure that the information is *needed*, is *not duplicative* of information already collected, and is collected *efficiently*." S. Rep. No. 96-930, 96th Cong., 2d

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[15] § 3512. **Public protection**

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

Sess. 9 (1980) (emphasis supplied). It is a symbol that the information collection request has been "subjected to the clearance process described by Section 3507." *Id.* The Third Circuit's decision has deprived the public of the meaningfulness of the OMB control number (No. 1218-0072) assigned to the HCS.

In focusing on Sections 3504(a) and 3518(e), and by not addressing the particular language of Sections 3506(a), 3507(a), 3508 and 3518(a), or the spirit of the PRA underlying Section 3512, the Third Circuit ignored this Court's recent command that, "In ascertaining the plain meaning of a statute, the court must look to *the particular statutory language* at issue, *as well as the language and design of the statute as a whole.*" *K mart Corp. v. Cartier, Inc.*, —— U.S. ——, 108 S.Ct. 1811, 1817 (1988) (emphasis supplied). Secondly, the Third Circuit overlooked that Congress has expressly delegated to OMB the power to "promulgate rules necessary to exercise its authority under the PRA." 44 U.S.C. § 3516. Such regulations are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, supra* at 844. In this case, we have two agencies, with their respective spheres of expertise, supporting (1) OMB's power to review under the PRA and (2) OMB's disapprovals in this case. Under this Court's *Chevron* ruling, deference is due the agencies unless it can be shown that OMB's action was "arbitrary or capricious." *Id.* The Third Circuit made no such finding, and if the court of appeals ruling is left unreviewed, a significant part of OMB's paperwork clearance function is effectively gutted, perhaps rendering the legislative goal to reduce paperwork burden unobtainable.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted in *United Steelworkers of America v. Pendergrass.*

Respectfully submitted,

CLARK R. SILCOX *
STEELE & FORNACIARI
2020 K Street, N.W., Suite 850
Washington, D.C. 20006
(202) 887-1779
Attorneys for Business Council on the Reduction of Paperwork

* Counsel of Record

(3) (4) (3)

No. 88-1070, 88-1075 and 88-1385

Supreme Court, U.S.
FILED
APR 3
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR, ET AL.

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR, ET AL.

NATIONAL GRAIN & FEED ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR

*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Counsel for Appellate Litigation

NATHANIEL I. SPILLER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the Secretary of Labor provided adequate notice to non-manufacturers that the hazard communication standard might be extended to them.

2. Whether the Secretary properly extended the hazard communication standard, which initially applied only to the manufacturing sector, to non-manufacturing sectors based on a general finding that the standard is reasonably necessary and appropriate to remedy a significant risk of material harm in those sectors, rather than on industry-specific findings.

3. Whether the Secretary properly determined that extension of the hazard communication standard to the non-manufacturing sectors was technologically and economically feasible.

4. Whether the Secretary's incorporation into the hazard communication standard of a list of hazardous chemicals developed by a private professional and scientific organization (the American Conference of Governmental Industrial Hygienists) constituted an unlawful delegation of rulemaking authority.

5. Whether the court of appeals erred in invalidating the Office of Management and Budget's disapproval, pursuant to the Paperwork Reduction Act of 1980, of certain provisions of the hazard communication standard.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1070

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

No. 88-1075

ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

No. 88-1385

NATIONAL GRAIN & FEED ASSOCIATION, INC., ET AL., PETITIONERS

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Associated Builders and Contractors, Inc.* v. *Brock* (*Associated*

Builders) is reported at 862 F.2d 63 (88-1070 Pet. App. 1a-15a; 88-1075 Pet. App. 1a-15a; 88-1385 Pet. App. 1a-15a). The opinion of the court of appeals in *United Steelworkers of America* v. *Pendergrass* (*USWA III*) is reported at 855 F.2d 108 (88-1070 Pet. App. 54a-68a; 88-1075 Pet. App. 24a-37a).

JURISDICTION

The court of appeals entered its judgment in *Associated Builders* on November 25, 1988 (88-1070 Pet. App. 19a-21a; 88-1075 Pet. App. 20a-23a; 88-1385 Pet. App. 19a-21a). The court of appeals entered its judgment in *USWA III* on August 19, 1988, and it denied the government's petition for rehearing on November 28, 1988 (88-1075 Pet. App. 38a-39a). Associated General Contractors, Associated Builders and Contractors, and the National Grain and Feed Association (together with United Technologies Corporation) filed petitions for a writ of certiorari on December 23, 1988, December 28, 1988, and February 21, 1989, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. In 1983, the Secretary of Labor published a final occupational hazard communication standard designed to address comprehensively "the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector" (29 C.F.R. 1910.1200(a)(2) (1984)). See 48 Fed. Reg. 53,280 (1983). The Secretary explained that she was limiting the standard's coverage to the manufacturing sector based on her determination "to first regulate those industries with the greatest demonstrated need" (*id.* at 53,286). On judicial review, the court of appeals held that the limitation to the manufacturing sector was unsupported and directed the Secretary:

> to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible.

United Steelworkers of America v. *Auchter* (*USWA I*), 763 F.2d 728, 736-738, 739 (3d Cir. 1985).

The Secretary thereupon commenced a new rulemaking proceeding and solicited comments on the extension of the hazard communication standard to the non-manufacturing sector. See 50 Fed. Reg. 48,794 (1985). Certain parties to the *USWA I* litigation objected to the new rulemaking and moved the court of appeals to hold the Assistant Secretary in contempt for failing to revise the hazard communication standard based on the existing administrative record. The court of appeals agreed that the regulatory revision should be based on the existing record and directed, under threat of contempt sanctions, that the Secretary:

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

United Steelworkers of America v. *Pendergrass* (*USWA II*), 819 F.2d 1263, 1270 (3d Cir. 1987). Although the federal government disagreed with that ruling, the Solicitor General determined, after rehearing was denied, not to file a petition for a writ of certiorari.

On August 24, 1987, the Secretary complied with the court's order and issued a final revised hazard communication standard covering both the manufacturing and the

non-manufacturing sectors of the economy (29 C.F.R. 1910.1200). See 52 Fed. Reg. 31,852 (1987).[1] The Office of Management and Budget (OMB) reviewed the standard pursuant to its authority under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* It disapproved three particular provisions and instructed the Secretary "to revise these requirements * * * or collect new information that would warrant a reconsideration of our decision" (52 Fed. Reg. 46,075, 46,076, 46,079 (1987)).[2]

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[1] Broadly speaking, the standard requires chemical manufacturers and importers to develop hazard information, label their chemical containers, and send material safety data sheets (MSDSs) to downstream manufacturing and non-manufacturing customers (29 C.F.R. 1900.1200(d), (f), (g)). The standard defines the chemical hazards that are covered and sets forth criteria the chemical manufacturers and importers must follow in making hazard determinations; it also incorporates several recognized lists of hazardous chemicals, inclusion on which automatically requires treatment of the chemical as hazardous for purposes of hazard communication (29 C.F.R. 1910.1200(c), (d), and Apps. A-C). Furthermore, the standard requires manufacturing and non-manufacturing employers (1) to prepare a written hazard communication program that describes the employer's general compliance plan and contains a list of the hazardous chemicals used in the workplace; (2) to ensure that labels remain affixed on the containers, and that when hazardous chemicals are transferred to new containers, those containers are also labelled properly; and (3) to maintain the MSDSs and make them readily accessible to employees in their work areas (29 C.F.R. 1910.1200(e), (f), (g)). In addition, employers must provide information and training to their employees with respect to the requirements of the standard and the chemical hazards present in the workplace (29 C.F.R. 1910.1200(h)).

[2] Specifically, OMB disapproved (1) "the requirement that [MSDSs] be provided on multi-employer worksites" through either the exchange of MSDSs among employers or their maintenance at a central location at the worksite; (2) "coverage of any consumer product excluded from the definition of 'hazardous chemical' under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986" that is in the same form and concentration as a consumer product, regardless of

2. The revised standard gave rise to two distinct legal challenges. In the first challenge, organizations representing employee interests in *USWA I* and *USWA II* argued that the Secretary was in contempt of the earlier orders when she acceded to OMB's review and disapproval of portions of the standard. More fundamentally, they argued that OMB lacked authority under the Paperwork Reduction Act to disapprove the pertinent provisions of the hazard communication standard. The court of appeals, while disagreeing that the Secretary was in contempt, agreed with the attack on OMB's authority and invalidated its disapproval, in effect restoring the standard to the form promulgated by the Secretary. *United Steelworkers of America* v. *Pendergrass* (*USWA III*), 855 F.2d 108 (3d Cir. 1988); 88-1075 Pet. App. 24a-37a.

In the second challenge, brought pursuant to 29 U.S.C. 655(f), organizations representing certain non-manufacturing employers argued that the Secretary improperly extended the hazard communication standard to the non-manufacturing sectors. The court of appeals disagreed with that contention and affirmed the validity of the standard. *Associated Builders and Contractors, Inc.* v. *Brock* (*Associated Builders*), 862 F.2d 63 (3d Cir. 1988); 88-1075 Pet. App. 1a-15a. The court concluded that its previous decisions in *USWA I* and *USWA II* largely controlled the outcome of the employer challenge (*id.* at 7a). The court rejected, both as a matter of precedent and on the merits, the employers' argument that the Secretary had failed to provide adequate notice to the non-manufacturing sectors that the agency's final standard

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how the product is used; and (3) "coverage of any drugs regulated by [the Food and Drug Administration] in the non-manufacturing sector" including those not sold in solid, final form. 52 Fed. Reg. 46,076 (1987); 29 C.F.R. 1910.1200(b)(6)(vii), (b)(6)(viii), (e)(2)(i).

might apply to them (*id.* at 10a-11a). It also reiterated its prior holding in *USWA I* that the Secretary had adequately made a general significant risk finding applicable to all workers exposed to hazardous chemicals, and held that the Secretary was not required to make specific findings of significant risk for each affected industry and substance (*id.* at 11a-13a). The court further concluded that the Secretary's feasibility determination was supported by substantial evidence, observing that the main components of the standard applicable to non-manufacturers—training and the maintenance of labels and data sheets—do not even approach the limits of feasibility (*id.* at 13a-14a).

In addition, the court ruled that the Secretary did not unlawfully delegate her rulemaking authority to a private organization (the American Conference of Governmental Industrial Hygienists (ACGIH)) when she incorporated that organization's list of hazardous chemicals into the standard (88-1075 Pet. App. 14a-15a). The court held that the validity of the Secretary's reliance on ACGIH—an "impartial scientific organization"—necessarily followed from its determination in *USWA I* that OSHA was not itself required to evaluate specific chemical hazards, but could impose that duty on the chemical manufacturers (*id.* at 15a). Moreover, the court concluded that adopting the ACGIH list as a floor of covered substances was fully consistent with the OSH Act, which directs OSHA to base its toxic substance standards on the "best available evidence" with due consideration to "the latest available scientific data" (*ibid.*). See 29 U.S.C. 655(b)(5).

ARGUMENT

1. Given the decisions in *USWA I* and *USWA II*, which are now final, the decision of the court of appeals in *Associated Builders* is correct. In any event, that decision

does not present any significant or recurring issues of law, and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of that decision is not warranted.

a. Petitioners ABC and NGFA contend (88-1075 Pet. 11-14; 88-1385 Pet. 23-26) that they received inadequate notice because the Secretary issued the revised hazard communication standard without first issuing a proposed rule applicable to non-manufacturers. This contention overlooks the fact that, as the court of appeals exhaustively detailed in *USWA II* and reiterated in the opinion below (88-1075 Pet. App. 10a), "the scope of industry coverage had been an important issue for public comment throughout the entire regulatory proceeding." In 1977, the Secretary issued an Advance Notice of Proposed Rulemaking that was not limited to the manufacturing sector, but invited all "interested persons" to submit information concerning the need for a hazard communication standard. 42 Fed. Reg. 5372, 5373; *USWA II*, 819 F.2d at 1265. This was followed by the 1982 notice of proposed rulemaking which "was at least as explicit." 88-1075 Pet. App. 11a. While proposing to cover only the manufacturing sector, "[t]hat notice invited comment on the appropriateness of the industry scope to be selected, and whether or not industries outside the manufacturing sector should be included." *Ibid.*; *USWA II*, 819 F.2d at 1266; 47 Fed. Reg. 12,092, 12,101-12,102.[3]

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[3] An earlier 1981 notice of proposed rulemaking, which was subsequently withdrawn for consideration of regulatory alternatives, similarly focused on the manufacturing sector while inviting comment "on the appropriate scope of coverage." 46 Fed. Reg. 4412, 4426; *USWA II*, 819 F.2d at 1265-1266.

Indeed, the court of appeals' remand in *USWA I* was based on that court's conclusion that the Secretary had already provided adequate notice to the non-manufacturing sectors. See *USWA II*, 819 F.2d at 1269. The court concluded that since "what was at issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees," no further evidentiary inquiry was necessary and that the original rulemaking record was adequate for purposes of the remand. *Id.* at 1267; see also *id.* at 1269 (the Secretary could "easily determine []" from the original record the non-manufacturing sectors' ability to comply with the standard); 48 Fed. Reg. 53,280, 53,286 (1983 final rule) (noting comments suggesting "that the scope [of the standard] should be expanded to cover all industries where employees are exposed to hazardous chemicals").

Petitioners' contention that the Secretary's failure to repromulgate a proposed rule for the non-manufacturing sectors violated Section 6(b)(2) of the OSH Act, 29 U.S.C. 655(b)(2), therefore lacks merit, because the earlier notices were legally "sufficient to alert all employers" to the scope issue and the ensuing revised final standard was a "logical outgrowth" of the proposals and the rulemaking that followed. 88-1075 Pet. App. 11a. See also *USWA III*, 88-1075 Pet. App. 36a; *USWA II*, 819 F.2d at 1269; *Action Alliance of Senior Citizens* v. *Bowen*, 846 F.2d 1449, 1455 (D.C. Cir. 1988), petition for cert. pending, No. 88-849. The court of appeals correctly held, both as a matter of circuit precedent and on the merits, that the Secretary had provided adequate notice to all employers. See *United Steelworkers of America* v. *Marshall*, 647 F.2d

1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S 913 (1981).[4]

Petitioners additionally argue (88-1070 Pet. 24-25; 88-1075 Pet. 13 n.5; 88-1385 Pet. 24-25) that, regardless of whether OSHA had provided legal notice to all employers, the court erred in cutting off the Secretary's additional round of notice and comment. This argument is unavailing. In *USWA II*, the Secretary defended her post-remand decision to conduct further rulemaking proceedings as well within her administrative discretion. The Secretary believed it would be useful to develop the record on feasibility in the non-manufacturing sectors, which,

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[4] As the court elsewhere held, the holding that the Secretary provided adequate notice also pertains to the several modifications to substantive aspects of the standard that were made in the revised standard: "The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed." *USWA III*, 88-1075 Pet. App. 36a, quoted in *Associated Builders*, 88-1075 Pet. App. 9a. This is certainly true of the change in the definition of "chemical manufacturer," 29 C.F.R. 1910.1200(c), to which petitioner NGFA objects (88-1385 Pet. 25-26 n.18). In keeping with the general broadening of the scope of the standard, this term was redefined solely by eliminating the reference to SIC Codes 20-39 (the manufacturing sector). In almost all cases, the change is purely technical and does not affect the assignment of responsibility for the development of hazard information; it does, however, capture the relatively unusual circumstance (as in the case of grain elevators) where a "chemical" is "produced" (*i.e.*, "manufacture[d], processe[d], formulate[d] or repackage[d]" by an employer outside of SIC Codes 20-39. 29 C.F.R. 1910.1200(c). Moreover, contrary to NGFA's suggestion (88-1385 Pet. 26 n.18), there is nothing incongruous about including grain dust in a hazard communication standard applicable to chemicals; the fact that grain is a food obviously does not mean that its dust is harmless to workers exposed to it in the workplace. See *National Grain & Feed Ass'n* v. *OSHA*, 858 F.2d 1019, 1022-1026 (5th Cir. 1988), modified on other grounds, Nos. 87-4960 and 88-4256 (Jan. 24, 1989).

despite the notice given to all employers, was relatively sparse in the original proceeding. When the court nonetheless held that the existing record was adequate to make the feasibility determination and that any further fact-gathering constituted undue delay and must cease, the Secretary sought rehearing en banc. The Secretary argued that the court's order imposed unwarranted limitations on the Secretary's administrative discretion and that a supplemental notice-and-comment rulemaking would, by enhancing the evidentiary record, make an extended standard more fully supportable. Once the court failed to grant rehearing, however, the government decided against seeking certiorari in the belief that further proceedings were not essential, and that the court's action, though unwarranted, would not be fatal to a revised rule. The Secretary's belief proved to be correct: the court below held that, on the basis of the existing record, she made a rational and defensible decision to extend the hazard communication standard to the non-manufacturing sectors.

There is no basis for revisiting now the question of whether the court should have permitted the Secretary the opportunity to complete her supplemental fact-gathering. The Secretary complied fully with the court's order when she issued the revised standard, and that standard must be judged solely on the basis of whether it is supported by substantial evidence in the record under review. It is irrelevant at this point that the Secretary might have developed a more extensive record if she had been permitted to do so.[5]

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[5] Petitioner AGC (88-1070 Pet. 27-28; cf. 88-1075 Pet. 13-14) additionally complains that the court below deprived the parties of meaningful judicial review by holding that certain issues, specifically those relating to the notice and significant risk requirements, had previously

b. Petitioners challenge (88-1070 Pet. 16-19; 88-1075 Pet. 14-16; 88-1385 Pet. 27-28) the court's holding (88-1075 Pet. App. 11a-13a) that the Secretary validly based the revised standard on a general finding of significant risk. The assertion that this holding is in error or in conflict with prior decisions of this Court and other courts of appeals does not withstand scrutiny.

As the court noted (88-1075 Pet. App. 12a, citing *USWA I*, 763 F.2d at 738), the Secretary's significant risk

been decided in *USWA I* or *USWA II* and were consequently binding on the parties. 88-1075 Pet. App. 10a-11a; see also *id.* at 15a. According to AGC (Pet. 27), this application of stare decisis undermined traditional standing principles because petitioners, who were not covered under the original standard, could not previously have challenged it in the court of appeals. See 29 U.S.C. 655(f). The implication, AGC warns (88-1070 Pet. 27), is that "[t]o preserve their right to challenge these findings * * * petitioners would have had to intervene in the proceedings brought to challenge OSHA's decision not to regulate outside the manufacturing sector." But the court of appeals also made alternative holdings that, aside from stare decisis, it independently believed that the Secretary had met the relevant notice and significant risk requirements. 88-1075 Pet. App. 10a-11a. Furthermore, it is clear that the principle of stare decisis, as codified in Third Circuit Internal Operating Procedure 8C, applies regardless of whether the parties in this case participated in the earlier proceeding. The court's invocation of this principle was unexceptional, and, consistent with IOP 8C, if petitioners thought that de novo review was merited notwithstanding the circuit precedent, they should have sought rehearing en banc.

In any event, there is nothing ominous about the result predicted by petitioners. The rules on intervention permit non-parties the opportunity to protect their interests in ongoing litigation; and there is no incompatibility between saying petitioners had no standing to challenge the original standard and saying they could have intervened as respondents to defend the Secretary's decision to limit its scope. Moreover, it is noteworthy that AGC does not assert that the Secretary inadequately represented its interest on this point in *USWA I* and *II*. It is also noteworthy that petitioners successfully intervened in *USWA III*.

finding in the original rulemaking "applied to all workers who would be exposed to hazardous chemicals." See also *USWA I*, 763 F.2d at 738 (noting record evidence that employees in sectors other than manufacturing are also exposed to hazardous chemicals and are in need of hazard information). In particular, the Secretary made an across-the-board determination that "inadequate communication about serious chemical hazards endangers workers," that "the standard will increase employee awareness of the potential health and safety risks associated with industrial chemicals[,] should result in increased [employee] use of personal protective devices, improved work practices, and other precautionary measures [, and] * * * should result in more safety-enhancing investments" by employers due to their increased knowledge about safety and health hazards, and that consequently the standard can be expected to yield a long-term significant reduction in chemical-source illnesses and injuries. 48 Fed. Reg. 53,280, 53,321, 53,328-53,329 (1983). Thus, the Secretary did "not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards." *USWA II*, 819 F.2d at 1267 (quoting 48 Fed. Reg. 53,286 (1983)). Although the Secretary initially chose to limit the scope of the standard to the manufacturing sector,[6] it was precisely the in-

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[6] In *USWA I*, the court stated that Section 6(g) of the OSH Act, 29 U.S.C. 655(g), while permitting the Secretary "to set priorities for the use of the agency's resources and to promulgate standards sequentially," could not be used to justify limiting the standard to the manufacturing sector where the Secretary had failed to explain "not merely that the sector selected for coverage presents greater hazards, but also why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards." 763 F.2d at 738. AGC (88-1070 Pet. 25-26) urges this Court to grant review on this question of the Secretary's priority-setting discretion. The govern-

congruity between her general risk findings and the standard's limited scope that prompted the court to confine its remand to the feasibility of the standard, as opposed to its need, in the non-manufacturing sectors. 88-1075 Pet. App. 12a; *USWA II*, 819 F.2d at 1267, 1270; *USWA I*, 763 F.2d at 737, 739.[7]

Moreover, in the course of making her post-remand feasibility determination, the Secretary "accumulated evidence to indicate that some employees in every SIC code designation are exposed to hazardous chemicals." 52 Fed. Reg. 31,852, 31,858 (1987); compare 48 Fed. Reg. 53,280, 53,284-53,286 (1983). She specifically referred to record evidence on the need for the standard for supermarket workers, hospital workers, barbers and beauticians, longshore workers, utility workers, dry cleaning and laundry workers, and farmworkers. 52 Fed. Reg. 31,852, 31,857 (1987). She also emphasized the long history of consultation with the OSHA Advisory Committee on Construction Safety and Health, which has repeatedly recommended a hazard communication standard for construction workers and estimated that 70% of all construction workers are exposed to chemical hazards. *Id.* at 31,857-31,858, 31,871 (Table 2; SIC codes 15-17).

The court of appeals was thus correct to conclude that the Secretary's significant risk determination met the threshold requirement for the issuance of an OSHA stand-

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ment, however, did not seek certiorari on this ruling and believes that the Secretary's subsequent extension of the standard to cover all employers has mooted the issue.

[7] See 50 Fed. Reg. 48,794, 48,795 (1985) ("the need for the standard has already been demonstrated, and the information required at this point is to establish the current status of hazard communication within the industries outside manufacturing, and the appropriateness of covering those industries in a manner similar to the coverage of manufacturing in the current rule").

ard. The purpose of the rulemaking was to develop a generic hazard communication standard. The Secretary's focus was therefore appropriately on whether the general failure of chemical manufacturers to disseminate adequate information about hazardous chemicals and of employers to provide their employees with such information posed a significant occupational safety and health risk and on whether OSHA could significantly reduce this risk through the development of appropriate standards. Having found, as a general matter, that a uniform hazard communication standard was necessary to remedy this universal problem (see, *e.g.*, 52 Fed. Reg. 31,850, 31,859 (1987) (discussing need for a single standard), 48 Fed. Reg. 53,280, 53,323-53,324 (1983) (discussing market failure)), the Secretary was under no further obligation to repeat her risk analysis for each of the 70 two-digit SIC codes that encompass the entire spectrum of economic activities in the private sector. Indeed, as the court below accurately concluded, "[a] requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible." 88-1075 Pet. App. 13a.[8]

Accordingly, contrary to petitioners' contentions (88-1070 Pet. 18; 88-1075 Pet. 14, 16; 88-1385 Pet. 27-28), the decision below is not at all in conflict with *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607

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[8] In issuing the standard, the Secretary estimated that there were as many as 575,000 hazardous chemical products, with thousands more introduced every year. 48 Fed. Reg. 53,280, 53,323 (1983).

(1980) (plurality opinion), in which the significant risk requirement under the OSH Act was first discussed. As this Court there explained, Section 3(8) of the OSH Act, 29 U.S.C. 652(8), requires the Secretary to find that a standard is reasonably necessary and appropriate to remedy significant workplace risks. 448 U.S. at 639. Nothing in that decision suggests, however, that a standard aimed at risks common to all industries is invalid unless the Secretary has first established the significance of the risk and the efficacy of the required practices in each and every one of the affected sectors. On the contrary, the Court emphasized that the Secretary, who retains the discretion to define the acceptable level of risk, "has no duty to calculate the exact probability of harm" and "is free to use conservative assumptions in interpreting the data * * *, risking error on the side of overprotection rather than underprotection." 448 U.S. at 655-656. Significantly, the Court also noted that the Secretary may impose certain "information-gathering" requirements below the level of risk needed to establish a permissible exposure limit for a specific toxic substance as a means of protecting unusually susceptible individuals or determining whether lower limits should be set. *Id.* at 658 & n.66. See also *id.* at 662-664 (Burger, C.J., concurring) (the Secretary has substantial discretion in making significant risk determinations). The lower court's recognition (88-1075 Pet. App. 13a) that a "general finding [of significant risk] concerning all potentially covered industries" must of necessity be sufficient to support a "performance-oriented information disclosure standard covering thousands of chemical substances used in numerous industries" therefore is fully consistent with *Industrial Union Department.*[9]

[9] Petitioners also err in asserting (88-1075 Pet. 14; 88-1385 Pet. 27) that the decision below conflicts with *American Textile Mfrs. Inst.* v.

Petitioners' contention (88-1070 Pet. 16-18; 88-1075 Pet. 15; 88-1385 Pet. 27-28) that this Court's review is warranted because the decision below conflicts with decisions of the Fourth, Fifth and District of Columbia Circuits dealing with the significant risk requirement also misses the mark. In *Texas Indep. Ginners Ass'n* v. *Marshall,* 630 F.2d 398, 406-409 (1980), the Fifth Circuit struck down the Secretary's standard for the cotton ginning industry in part for failure to make an adequate significant risk finding.[10] There, the Secretary had determined that a different standard than the one she had issued for the rest of the cotton industry was necessary to protect cotton gin workers, but she had not supported this determination with substantial evidence of significant risk at the much lower exposure levels and in the less harmful working conditions that are prevalent in the domestic cotton ginning industry. Here, by contrast, the Secretary recognizes the need for a uniform hazard communication standard to cover all industries because lack of information about a hazardous chemical poses a significant risk to a worker regardless of the exact conditions of use and because the chemical manufacturers, who must bear the primary responsibility for providing hazard information, generally distribute the chemicals in a single stream of commerce.

Donovan, 452 U.S. 490, 536-540 (1981). The Court there invalidated a portion of the OSHA cotton dust standard because the Secretary had included a wage guarantee requirement for reasons of general fairness unrelated to safety and health; the Court nowhere held that the OSH Act requires a separate significant risk justification for each provision of a standard when the goal to advance occupational safety and health is not in doubt.

[10] The Fifth Circuit's independent holding that the standard was invalid because the Secretary failed to perform cost-benefit analysis was discredited by this Court in *American Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. 490, 510-511 n.30 (1981).

See 52 Fed. Reg. 31,852, 31,859, 31,864 (1987); 48 Fed. Reg. 53,280, 53,295-53,296 (1983). Moreover, *Texas Independent Ginners* involved a standard setting, *inter alia,* specific control requirements. There is a fundamental distinction between that kind of standard and a performance-oriented, informational standard such as hazard communication. See 88-1075 Pet. App. 13a; *Louisiana Chemical Ass'n* v. *Bingham,* 550 F. Supp. 1136, 1146 (W.D. La. 1982), aff'd per curiam, 731 F.2d 280 (5th Cir. 1984); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform,* 92 Harv. L. Rev. 549, 580 (1979).

The other two cases relied on by petitioners are simply inapposite. In *Forging Indus. Ass'n* v. *Secretary of Labor,* 773 F.2d 1436, 1454-1455 (1985) (en banc), the Fourth Circuit ruled that the Secretary acted within her discretion when she included the tree care industry within the general hearing conservation standard, even though that industry purportedly has many of the same characteristics as the oil and gas drilling industry, which the Secretary had decided to exclude from the general standard and to cover in a separate comprehensive standard. And in *United Steelworkers of America* v. *Marshall,* 647 F.2d at 1309-1310, the D.C. Circuit upheld the Secretary's exclusion of the construction industry from the lead standard on grounds of feasibility, not significant risk.

In sum, nothing in these cases stands for a general legal principle that the Secretary must separately assess the risk in every industry to be covered by a single standard once the Secretary has determined that they all share a common significant risk or that the Secretary is required under the "reasonably necessary and appropriate" language of Section 3(8) to subject each facet of such a standard to

industry-by-industry risk analysis. See 88-1070 Pet. 21-23; 88-1075 Pet. 14-15; 88-1385 Pet. 28.[11]

c. Petitioners' argument (88-1070 Pet. 19-21; 88-1075 Pet. 16-18; 88-1385 Pet. 28-29) that the court improperly shifted the Secretary's burden of proving the technological and economic feasibility of the standard is also erroneous. Under the statute, the Secretary must issue toxic substance standards that "to the extent feasible" assure that no worker is subject to material harm resulting from hazardous working conditions. 29 U.S.C. 655(b)(5). The Secretary's burden is therefore to establish, by substantial evidence, that the standard does not exceed the limits of technological or economic feasibility. *American Textile Mfrs. Inst.* v. *Donovan,* 452 U.S. at 508-509, 513 n.31. The court of appeals' observation that the rulemaking record "contained no credible evidence that the standard would be technologically or economically infeasible" (88-1075 Pet. App. 14a) in the non-manufacturing sector

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[11] In any event, there can be no doubt that there is a significant risk in the construction industry, where more than 70% of all employees are exposed to hazardous chemicals. See 52 Fed. Reg. 31,852, 31,871 (1987) (Table 2; SIC codes 15-17). Moreover, contrary to petitioner ABC's argument (88-1075 Pet. 15), this risk is not eliminated by existing OSHA requirements (29 C.F.R. 1926.21) that construction workers be trained in the use of hazardous materials because, absent the hazard communication standard, there is no corresponding obligation for suppliers to provide the necessary hazard information to the contractors and no requirement for the maintenance on site of warning labels and material safety data sheets or for the development of written hazard communication plans. 88-1075 Pet. App. 13a. Likewise, the hazards associated with grain dust are well known and establish the existence of a significant risk in the grain and feed industry warranting its coverage by a hazard communication standard. *Ibid.* See *National Grain & Feed Ass'n* v. *OSHA,* 858 F.2d 1019, 1022-1026 (5th Cir. 1988), modified on other grounds, Nos. 87-4960 and 88-4256 (Jan. 24, 1989).

constitutes a finding that the Secretary met that burden here.

Indeed, the Secretary not only concluded that the record contained no "credible evidence indicating the standard would be infeasible for any individual sector"—thereby responding to the exact terms of the remand order in *USWA II*, 819 F.2d at 1270—but she also affirmatively found that "the original record on the whole supports a finding that the performance-oriented [standard] is feasible for all industries." 52 Fed. Reg. 31,852, 31,855 (1987). The Secretary based this finding in part on the fact that feasibility had already been established in the manufacturing sector, in which the chemical manufacturers in particular bear by far the largest compliance burden of any employer group; in part on experience gained under the original standard and in states that had already extended hazard communication requirements to the non-manufacturing sectors; and in part on record evidence from employers and employees in the non-manufacturing sectors indicating that the standard would be practical in their sectors. 52 Fed. Reg. 31,853, 31,855-31,857 (1987). The Secretary found further support for her finding in a post-remand regulatory analysis that quantified the Secretary's cost estimates on an industry-by-industry and establishment-size basis and concluded that the costs for the non-manufacturing sectors (including construction) would fall within the ranges already established and determined to be reasonable for the manufacturing sector. *Id.* at 31,869-31,874; compare 48 Fed. Reg. 53,280, 53,332-53,334 (1983).[12]

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[12] This regulatory analysis, together with other evidence that was accumulated since *USWA I*, filled in the perceived gaps in the original record that the Secretary identified in the rehearing petition following *USWA II*. See 88-1070 Pet. 10-11. Furthermore, the Secretary

Thus, the court of appeals not only applied a correct legal test, but it properly concluded that the standard's requirements "hardly approach the limits of feasibility" and that the Secretary's feasibility determination for the non-manufacturing sectors "is on the agency record completely supportable" (88-1075 Pet. App. 14a). That determination does not warrant further review.

d. Petitioner NGFA additionally contends (88-1385 Pet. 9-19) that the court of appeals erred in upholding the Secretary's reliance on the ACGIH *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment* (latest edition) (TLV list) to provide a mandatory floor of hazardous substances that are automatically covered by the hazard communication standard. The principal argument (88-1385 Pet. 10-14) is that the Secretary is required to make a significant risk determination with respect to each regulated substance, and that the Secretary never made that threshold determination concerning grain dust and other substances included in the TLV list, because that responsibility has been unlawfully delegated to a private organization.

This argument is deeply flawed. Like the significant risk challenge discussed above, NGFA's delegation argument is based on the fundamental misperception that the

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recognized that the issue with respect to the non-manufacturing sectors was largely "the employers' obligation to make MSDSs available to their employees and to provide employees with hazard information and training." *USWA II*, 819 F.2d at 1266. See also *id.* at 1267; *USWA I*, 763 F.2d at 738-739. The Secretary intentionally designed a performance-oriented standard permitting an individual employer to adopt different cost-effective strategies for meeting the standard's requirements and made several changes in the standard to make it more suitable for non-manufacturing workplaces. 52 Fed. Reg. 31,852, 31,860 (1987); 48 Fed. Reg. 53,280, 53,281-53,282 (1983); 88-1075 Pet. App. 9a, citing *USWA III*, 855 F.2d at 113.

Secretary was under an obligation to determine separately the risk associated with each substance potentially covered by the standard. Rather, the Secretary was required to determine that lack of hazard communication generally posed a significant risk to workers, and that a standard was reasonably necessary and appropriate to reduce the risk. Thus the focus of the rulemaking was appropriately directed toward defining the categories of hazards (not specific chemicals) to be covered by the standard and toward developing a workable methodology for establishing which chemicals would be subject to the standard's hazard communication requirements.

Based on an extensive rulemaking record, the Secretary determined that the most protective hazard communication standard could be achieved only by placing the responsibility for hazard determination on the chemical manufacturers. 48 Fed. Reg. 53,280, 53,286-53,289 (1983); 88-1075 Pet. App. 15a; *USWA I*, 763 F.2d at 739 (upholding OSHA's hazard determination procedure over the suggested alternative of exclusive reliance on government-generated lists of hazardous chemicals). See 29 C.F.R. 1910.1200(c) (definitions of "health hazard" and "physical hazard"), (d) ("hazard determination"), and Appendices A-C.[13] NGFA does not challenge the Secre-

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[13] More specifically, the standard requires each chemical manufacturer or importer to evaluate the hazards of chemicals produced in its workplace or imported by it. 29 C.F.R. 1910.1200(d). The standard sets out the categories of health and physical hazards to be evaluated, provides criteria for evaluating the "available scientific evidence" on each hazard category, and includes a non-mandatory list of references that could aid the hazard determination process. 29 C.F.R. § 1910.1200(c), (d), and Appendices A-C. According to the prescribed criteria, the chemical manufacturer or importer must treat as hazardous—and therefore develop a container label for and MSDS including the relevant hazard information on—any chemical for which

tary's imposition of that duty on the chemical manufacturers. Yet, the Secretary's incorporation of certain mandated lists, including the TLV list, into this requirement was part and parcel of this regulatory decision; having invested the chemical manufacturers with considerable discretion to determine which chemicals are hazardous, she determined the need to limit that discretion by, among other methods, putting an objective "floor" under the hazard determination process. 48 Fed. Reg. 53,280, 53,299, 53,336 (1983).[14]

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there is "at least one positive study conducted in accordance with established scientific principles" finding adverse health effects, as defined by the standard. 29 C.F.R. § 1910.1200(d)(2). In addition, the standard mandates that the chemical manufacturer or importer shall consider to be hazardous any chemical that is included on one of several well-known lists of hazardous chemicals. 29 C.F.R. § 1910.1200(d)(3), (4). One of the prescribed sources of information is the latest edition of the ACGIH TLV list. 29 C.F.R. § 1910.1200(d)(3)(ii).

ACGIH "is an impartial scientific organization which identifies safe exposure levels for various substances." 88-1075 Pet. App. 15a. Its membership is limited to professionals in governmental agencies or educational institutions engaged in occupational safety and health programs. A TLV (threshold limit value) is a recommended airborne concentration and represents conditions under which nearly all workers may be repeatedly exposed daily without adverse effect. ACGIH's TLVs are established by committees of recognized experts who review the available scientific literature. For instance, before adopting a TLV for grain dust, it solicited public comment and relied on 36 scientific studies or reports. ACGIH, *Documentation of the Threshold Limit Values and Biological Exposure Indices* 288-289.2 (5th ed. 1986). The ACGIH TLV list, which currently includes approximately 600 substances, is updated annually.

[14] At bottom, the TLV list simply provides a readily-available source of credible scientific information. For example, NGFA strenuously objects to ACGIH's inclusion of oat, wheat, and barley dust on its TLV list. But as noted *supra* (note 13), ACGIH based its

The inclusion of mandated lists was thus a common sense response to apparent deficiencies in the proposed hazard determination process, which assigned chemical manufacturers the responsibility for making hazard determinations without a corresponding check on their broad discretion. 47 Fed. Reg. 12,092, 12,121, 12,123 (1982 proposal). See 48 Fed. Reg. 53,280, 53,286-53,288 (1983 discussion of rulemaking record). In particular, the Secretary's choice of the TLV list to form a floor under the hazard determination process responded to repeated comments that the list is routinely used by responsible industrial hygienists as an authoritative source of information on well-known hazardous substances. *Ibid.*[15]

The court correctly concluded (88-1075 Pet. App. 15a) that the use of the TLV list in conjunction with the chemical manufacturers' independent duty to research and assess hazards was both "appropriate" and fully consistent

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TLV for grain dust on 36 scientific studies and reports. If only one of these contains "evidence which is statistically significant" and was based on a study "conducted in accordance with established scientific principles," the standard requires grain dust to be treated as a health hazard *regardless* of its status on the TLV list. 29 C.F.R. 1910.1200(d)(2). Moreover, "the propensity of grain elevators to blow up" (88-1075 Pet. App. 13a) makes grain dust, in any event, a "physical hazard" subject to the standard. As a practical matter, therefore, the inclusion in 1986 of oat, wheat, and barley dust on the TLV list did not significantly add to the obligations that employers in the grain industry incurred when the standard was extended to apply to non-manufacturers.

[15] Interested parties, including NGFA, had every opportunity to participate in the rulemaking and to add to the record on appropriate hazard determination methods. Furthermore, Section 6(f) of the OSH Act, 29 U.S.C. 655(f), provided them with the right to seek pre-enforcement judicial review of the Secretary's regulatory decision. There was accordingly no unfairness in the way the Secretary incorporated the TLV list into this standard.

with the Secretary's statutory authority to set standards.[16] The hazard determination scheme, including the incorporation of the mandated lists, was obviously in fulfillment, not derogation, of this mandate.[17]

Furthermore, NGFA clearly misses the mark (88-1385 Pet. 19-22) when it argues that the Secretary somehow crossed the line that demarcates constitutional delegations

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[16] Congress directed the Secretary to achieve the OSH Act's goal of safe and healthful working conditions for all Americans in part by "developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U.S.C. 651(b)(5). Moreover, Section 6(b)(5), 29 U.S.C. 655(b)(5), which governs the issuance of toxic substance standards, directs the Secretary to base the standards on "the best available evidence" and with due consideration given to "the latest available scientific data"; it also states a preference for standards expressed in terms of "objective criteria and of the performance desired." In addition, Section 6(b)(7), 29 U.S.C. 655(b)(7), prescribes standards for labels and other forms of warning to "insure that employees are apprised of all hazards to which they are exposed." Cf. 29 U.S.C. 657(g)(2) (the Secretary has general authority to "prescribe such rules and regulations as [s]he may deem necessary to carry out [her] responsibilities under this [Act]"); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980).

[17] NGFA argues (88-1385 Pet. 14-18) that Congress could not have intended the Secretary to incorporate the recommended standards of private organizations into Section 6(b) standards because, in Section 6(a), it specifically authorized the adoption, without rulemaking, of previously-established national consensus and federal standards for only the first two years following the effective date of the OSH Act. See 29 U.S.C. 655(a). The fact, however, that Congress, out of concern for procedural fairness to the regulated community, limited the time in which the Secretary was permitted to adopt existing standards as final OSHA standards without full rulemaking does not imply that it similarly prohibited the Secretary from concluding, based on a complete rulemaking record, that the incorporation by reference of particular hazard determinations in a private standard into a comprehensive Section 6(b) standard is reasonably necessary or appropriate.

of rulemaking authority.[18] This Court has long recognized that the legislature—or, as in this case, a standard-setting agency acting pursuant to delegated authority—may seek private assistance in "matters of a more or less technical nature." *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 537 (1935). See *Cospito* v. *Heckler,* 742 F.2d 72, 87-88 n.25 (3d Cir. 1984), cert. denied, 471 U.S. 1131 (1985). In general, delegations of this sort pass constitutional muster so long as the delegatee provides needed practical expertise, is not likely to exercise its limited authority in a biased or self-aggrandizing manner, and does not replace the governmental entity as the ultimate policymaker regarding the matter being regulated. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398-400 (1940). These criteria are obviously satisfied in this case.[19]

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[18] Significantly, the courts of appeals uniformly have upheld the constitutionality of the Secretary's authority to issue Section 6(a) standards, which, as noted *supra* (note 17), involve the wholesale adoption, without rulemaking, of national consensus standards developed by certain private organizations. *Towne Constr. Co.* v. *OSHRC,* 847 F.2d 1187, 1189 (6th Cir. 1988); *Modern Drop Forge Co.* v. *Secretary of Labor,* 683 F.2d 1105, 1110 (7th Cir. 1982); *Noblecraft Indus., Inc.* v. *Secretary of Labor,* 614 F.2d 199, 203 (9th Cir. 1980). Moreover, many of these Section 6(a) standards themselves incorporate privately established standards by reference. *Towne Constr. Co.,* 847 F.2d at 1189. Cf. *Todd & Co.* v. *SEC,* 557 F.2d 1008, 1012 (3d Cir. 1977) (upholding SEC's reliance on private security dealer association's disciplinary procedures).

[19] The Secretary did not delegate to ACGIH the policy-making role of setting a hazard communication standard or even of devising the requirements for hazard determination; rather, the Secretary simply required the use of ACGIH's existing TLV list, among other specified lists and criteria, as a source of public information in the hazard determination process. Moreover, the Secretary adopted ACGIH's TLV list

2. Petitioner ABC also challenges (88-1075 Pet. 18-19) the court of appeals' decision in *USWA III*, which held that OMB lacked authority under the Paperwork Reduction Act to disapprove certain provisions of the Secretary's hazard communication standard. The Acting Solicitor General has filed a petition for a writ of certiorari challenging that decision as well. See *Dole* v. *United Steelworkers of America*, No. 88-1434 (filed Feb. 27, 1989). We suggest that this Court grant the government's petition, rather than ABC's. First, as ABC seems to recognize (88-1075 Pet. 18-19), the question presented by that case is far more important to the federal government than to any individual litigant. As the government's petition explains in detail, the court of appeals' decision will substantially interfere with OMB's responsibility to review a wide range of federal information collection activities. Second, ABC's petition primarily challenges the *Associated Builders* decision, and provides only a cursory discussion of issues presented by the *USWA III* decision.

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with full knowledge that ACGIH is a well-respected professional organization with specific expertise in the area of hazard determination, that it is not itself a chemical manufacturer with responsibility for hazard determinations under the standard or in an adversarial position vis-à-vis any segment of the regulated community, and that the TLV list historically has been developed based on stringent scientific criteria.

NGFA makes much of the fact (88-1385 Pet. 13, 22) that ACGIH is not bound by the same procedural and substantive limitations that constrain the Secretary in setting OSHA standards. But neither are the chemical manufacturers when they perform hazard determinations, nor, for that matter, are the scientists upon whose studies they must base their evaluations. Quite simply, hazard determination, whether done by ACGIH or a chemical manufacturer, is not the same as standard-setting. Moreover, if the regulated community has a credible basis for objecting to ACGIH's future hazard determinations, it may petition the Secretary for modification of the standard. See 29 U.S.C. 655(b); 29 C.F.R. 1911.3.

And third, ABC, which was an intervenor in *USWA III*, will have a full opportunity to present its views as a respondent to the government's petition. Under these circumstances, we believe that it would be appropriate to deny ABC's petition in full.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Counsel for Appellate Litigation

NATHANIEL I. SPILLER
Attorney
Department of Labor

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *et al.*,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,

Respondents.

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

ELIHU I. LEIFER
VICTORIA L. BOR
CHRISTOPHER S. RICHARDSON
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

GEORGE H. COHEN
JEREMIAH A. COLLINS
JOHN ROTHCHILD
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

The *certiorari* petitions in these cases challenge 7 aspects of OSHA's Hazard Communication Standard and the Third Circuit's decisions reviewing that Standard:

(a) the Third Circuit's factual determination that petitioners received adequate notice that the Hazard Communication Standard might be applied to their industry;

(b) the Third Circuit's statement that petitioners should be foreclosed from raising issues settled in prior litigation in which petitioners could have intervened, where the Third Circuit nevertheless proceeded to consider and reject petitioners' contentions on the merits;

(c) OSHA's factual determinations accepted by the Third Circuit regarding the existence of a "significant risk" in the affected industries;

(d) OSHA's factual determinations accepted by the Third Circuit that compliance with the Standard is feasible for the affected industries;

(e) petitioners' contention that the Standard—whose provisions plainly have a health-protective purpose and are not merely redundant of existing protective requirements—is not "reasonably necessary or appropriate";

(f) the Third Circuit's rulings in two earlier related proceedings that OSHA's original Standard arbitrarily and capriciously failed to cover employees subject to the significant risks the Standard is intended to correct, which petitioners contend constituted improper interference with OSHA's setting of rulemaking priorities;

(g) OSHA's determination, after full rulemaking, that the findings of a private scientific body provide an appropriate base for listing a chemical as a hazardous substance for purposes of the Standard.

The question presented is whether any of these determinations are worthy of this Court's review.

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

Respondents United Steelworkers of America, AFL-CIO, CLC ("USWA") and Building and Construction Trades Department, AFL-CIO ("BCTD") submit this brief in opposition to the petitions for certiorari in Nos. 88-1070 ("AGC Pet."), 88-1075 ("ABC Pet.") and 88-1385 ("NGFA/UT Pet."), insofar as those petitions seek review of the decision in *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988) ("*ABC v. Brock*").[1]

STATEMENT

1. The Provisions of the Hazard Communication Standard.

To enable employees to protect themselves from threats to their health, the regulation at issue here—the Hazard Communication Standard ("HCS" or "the Standard") promulgated by the Occupational Safety and Health Administration ("OSHA" or "the Agency")—requires employers to provide employees with basic information concerning hazardous substances found in the workplace, through a combination of methods including labeling, material safety data sheets ("MSDSs") and training.

The lion's share of the responsibilities created by the HCS falls on chemical manufacturers, importers and (to a lesser extent) distributors. The manufacturers and importers have the obligation under the Standard to "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200(d)(1). In addition, manufacturers and importers must treat as "hazardous" chemicals appearing on either of two lists: (1) the list of substances for which OSHA has established exposure limits in the standard

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[1] The petition for certiorari in No. 88-1075 also seeks review of the decision in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988) ("*USWA III*"). The position of USWA and BCTD with respect to that decision is set out in their brief in opposition filed this date in *Elizabeth Dole, et al. v. United Steelworkers of America, et al.*, No. 88-1434.

for Air Contaminants that appears at 29 C.F.R. Part 1910, Subpart Z; and (2) the latest edition of *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment*, which is published and updated annually by the American Conference of Governmental Industrial Hygienists ("ACGIH").[2] 29 C.F.R. § 1910.1200(d)(3). The manufacturers and importers must "obtain or develop a material safety data sheet for each [such] hazardous chemical," § 1910.1200(g)(1), and must "ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment" of a hazardous substance "and with the first shipment after a material safety data sheet is updated," § 1910.1200(g)(6). Chemical manufacturers, importers, and distributors must also "ensure that each container of hazardous chemicals leaving the workplace is labeled" with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1).

Other employers, including the construction industry petitioners in Nos. 88-1070 and 88-1075, have much less extensive obligations under the HCS; these employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers and importers. These employers must: (1) maintain copies of the MSDSs they receive, and make them accessible to employees at the worksite, § 1910.1200(g)(8);[3] (2) see to it that containers of hazardous chem-

[2] ACGIH is a professional society whose membership consists of occupational health professionals who work for governmental agencies and educational institutions. Chemicals appearing on the Threshold Limit Values list are those that ACGIH has determined pose a health risk to employees who are exposed to them above a certain concentration.

[3] Where employees must travel between workplaces during a shift, "the material safety data sheets may be kept at a central location at the primary workplace facility." § 1910.1200(g)(9). At multi-employer workplaces, if the circumstances are such that the employees of one employer may be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter

icals in the workplace are labeled with information corresponding to that provided on the labels arriving from the chemical manufacturers and importers, § 1910.1200 (f) (5); (3) provide employees with information and training on hazardous chemicals, § 1910.1200(h); and (4) develop, implement, and maintain a written hazard communication program that describes how the employer will meet the HCS's requirements as described above, § 1910.1200(e) (1).

2. History of the Regulation.

The rulemaking that culminated in the HCS was initiated by a Notice of Proposed Rulemaking published on March 19, 1982. *See* 47 Fed. Reg. 12092 *et seq.* (1982). In that notice OSHA proposed to limit the scope of the Standard to (i) chemical manufacturers and (ii) employers in the manufacturing sector as defined by Standard Industrial Classification (SIC) Codes 20 through 39. *Id.* at 12092, 12101, 12119. In support of the latter limitation, the Agency stated that "[i]t appears that employees in manufacturing facilities are at the greatest risk of harmful exposure to chemicals." *Id.* at 12101.

However, OSHA's notice made it clear that the question of the scope of the Standard had not been finally resolved, but was a matter to be determined in the rulemaking. Stating that "[*t*]*he scope of the* [*proposed*] *standard could have been* limited only to chemical manufacturers (SIC 28), or could have been *broadened to include all employers in all workplaces*," *id.* at 12101 (emphasis added), OSHA concluded its discussion of this aspect of the proposal with the following words: "*Comment is hereby invited on the appropriateness of the industry scope selected, and whether other industries should be included in the final standard if the record warrants it.*" *Id.* at 12102 (emphasis added).

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must either provide copies of the MSDSs for such chemicals to the other employer, "or . . . make [them] available at a central location in the workplace." § 1910.1200(e)(2)(i).

In opening the rulemaking hearings, OSHA's Director of Health Standards Programs reiterated that the scope of the Standard was "certainly an open issue," and one on which the Agency "welcome[d] additional comment." [4] He added:

> . . . [T]he objective in a hearing like this is to try to get suggestions from interested parties as to what the agency should do and *the preliminary proposal to narrow the scope of the standard* to just those . . . [SIC] codes *is just that, it's a preliminary proposal.*
>
> * * * *
>
> The agency's mind is not made up on that and we're ready to listen to anything and to accept any kind of evidence, orally or in writing, which you might have.
>
> * * * *
>
> The scope of the standard will be determined by the evidence presented. *The evidence will dictate what we do. Now if the evidence supports going beyond SIC Codes 20 through 39, we'll go beyond SIC Codes 20 through 39.*
>
> * * * *
>
> For that reason, we're having hearings across the country and obtaining new current information.[5]

In response to OSHA's notice, extensive evidence was submitted in the rulemaking proceedings supporting the application of the Standard to non-manufacturing industries,[6] including specifically the construction industry.[7]

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[4] *Informal Public Hearings on Hazard Communication before the Occupational Safety and Health Administration* (1982), transcript p. 14 (testimony of R. Leonard Vance).

[5] *Id.* at 27-30 (emphasis added).

[6] *See e.g.*, testimony in the transcript of the 1982 rulemaking hearing at 411-13, 417-18, 606-07, 1354-55, 1360, 1470, 2123-24, 2193-97, 2254-61, 2653-54, 2808-09, 2936-37, 3036, 3077-79, 3597-98, 3814-27, and the following exhibits introduced therein: 19-109; 19-161; 36; 49; 52C; 62; 111; and 122.

[7] *See, e.g.*, testimony in the transcript of the 1982 rulemaking hearing at 2123-24 (Rodney Wolford of the International Brother-

At the conclusion of the rulemaking, OSHA promulgated a final standard in November 1983. *See* 48 Fed. Reg. 53280 *et seq.* (1983). The scope of that Standard was broader than had been proposed in the March 1982 notice in one respect: where the proposal had required only chemical *manufacturers* to perform hazard evaluations and to prepare MSDSs and labels, the Standard as promulgated required chemical *importers* (and, in some instances, chemical *distributors* as well) to do the same. § 1910.1200(d)(1), (f)(1), (g)(1); 48 Fed. Reg. 53286-87, 53342-43. However, as in the March 1982 proposal, all other provisions of the final Standard were limited to employers in the manufacturing sector, *i.e.* SIC Codes 20 through 39.

In the preamble to the Standard, OSHA discussed its decision on the scope issue at length, characterizing that issue as one of the key "technical and policy issues raised by the proposed standard." *Id.* at 53284. Acknowledging that much evidence had been offered to support the proposition that the scope of the Standard should be expanded to include non-manufacturing industries, *id.* at 53286, OSHA explained its decision as follows:

> It should be emphasized that the Agency does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rulemaking priorities, and chosen to first regulate those industries with the greatest demonstrated need. [*Id.*]

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hood of Painters and Allied Trades (IBPAT)) (paint applicators in construction need HCS at least as much as those in manufacturing); Exh. 19-161 at 6 (IBPAT) ("the [health] problems and solutions for the paint and allied trades industry extend from the manufacturer through the applicator without regard for artificial distinctions such as SIC Codes"); Exh. 36 at 12-13 (AFL-CIO) (need for HCS "is as great in construction as in manufacturing"); Exh. 49 at 6-7 (UAW).

USWA and others filed petitions for review of the 1983 Standard. USWA contended, *inter alia*, that OSHA's decision to limit the Standard to the manufacturing sector was not supported by the rulemaking record, while petitioner Public Citizen attacked OSHA's determination not to adopt the *Registry of Toxic Effects of Chemical Substances* ("RTECS") published by the National Institute for Occupational Safety and Health ("NIOSH") as the base list of chemicals deemed to be hazardous.[8]

On review, the Third Circuit held that OSHA's rationale for confining the Standard to manufacturing "does not withstand . . . scrutiny." *United Steelworkers of America v. Auchter*, 763 F.2d 728, 739 (3d Cir. 1985) (*"USWA I"*), AGC Pet. App. at 41a.[9] That court noted that OSHA's reasoning failed even to "address the . . . contention" that because the hazards dealt with by the Standard cut across all SIC Codes, it is irrational to limit the HCS to particular SIC Codes. AGC Pet. App. at 39a. And the Third Circuit recognized that OSHA's sole rationale for limiting the Standard to the manufacturing sector—namely, the contention that employees in that sector, taken as a whole, experience a higher rate of illness from exposure to hazardous chemicals than employees in other sectors—was doubly flawed. First, OSHA's contention was, at best, a gross overgeneralization, *see* AGC Pet. App. at 37a-38a; and second, even to the extent that the generalization might be sound, it would only provide a reason "why the . . . [HCS should apply to] employees in the manufacturing sector, [and would not explain] why the same information is not needed for workers in other sectors. . . ." AGC Pet. App. at 41a.

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[8] The RTECS list contains far more substances than the two lists adopted by OSHA. *See* 48 Fed. Reg. 53298 (1983).

[9] References to "AGC Pet. App." are to the Appendix to the Petition for Certiorari in No. 88-1070.

Relying on § 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), which expressly mandates OSHA to promulgate standards that are designed to assure that "*no* employee will suffer material impairment of health,"[10] the Third Circuit directed the Secretary "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." AGC Pet. App. at 42a. As that court subsequently explained, "[t]hat holding was made with full cognizance of the fact that what was in issue with respect to the non-manufacturing sectors was only the employer obligation to communicate the hazard information already prepared by chemical manufacturers, importers, and distributors to employees." *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1267 (3d Cir. 1987) (*"USWA II"*), AGC Pet. App. at 63a.[11]

Instead of proceeding promptly to the reconsideration that had been ordered by the Third Circuit, OSHA delayed, and did nothing except to publish an Advance Notice of Proposed Rulemaking ("ANPR") soliciting public comment on various matters relating to industries not covered by the HCS. *See* 50 Fed. Reg. 48794 *et seq.* (1985). At that juncture USWA returned to the Third Circuit, filing a motion to enforce the order that court

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[10] Section 6(b)(5) provides in pertinent part that "[t]he Secretary, in promulgating standards dealing with toxic materials or harmful physical agents . . ., shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." *See infra* at 20.

[11] The Third Circuit also rejected Public Citizen's challenge to OSHA's decision not to incorporate the RTECS list, holding that OSHA acted properly on the basis of its finding that the RTECS list was both overinclusive and underinclusive for this purpose. AGC Pet. App. at 42a.

had entered in *USWA I*. In *USWA II* the Third Circuit granted USWA's motion in pertinent part, concluding that the "further inquiry" in which OSHA was engaged "was unnecessary." AGC Pet. App. at 65a. That court held that the rulemaking proceedings conducted prior to the promulgation of the 1983 HCS had given adequate notice to all employers that the standard might cover non-manufacturing industries, and that there was no reason to conduct further proceedings because the original rulemaking record provided a proper basis for determining the final scope of the Standard. AGC Pet. App. at 65a-68a.[12]

Having determined that OSHA was unreasonably delaying the extension of the HCS to other industries, the Court of Appeals issued the following order, AGC Pet. at 68a (footnote omitted):

> [W]e will direct that the Secretary shall, within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard commu-

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[12] In that connection that Third Court noted that the 1983 Standard covered importers and distributors, even though the 1982 Notice had not done so:

> Indeed, the Secretary had no difficulty justifying the inclusion of importers and distributors, by noting that "[t]he additional cost . . . incurred by these employers . . . [will] be minimal [because they] will merely be passing on information obtained from the chemical manufacturers." 48 Fed. Reg. at 53,331. As petitioners point out, this is equally true of all non-manufacturer user employers. Plainly, the ease with which the same information can be utilized by those employers can be easily determined from the information already in the record. We proceeded in the prior case on that assumption. [*USWA II*, AGC Pet. App. at 67a.]

> nication standard is not feasible. Such reasons will be supplied separately as to each category of excluded workers.

Subsequently, on August 24, 1987, OSHA promulgated the Standard at issue here, extending the coverage of the HCS to all employers covered by the Act. 52 Fed. Reg. 31852-86 (1987). In addition to expanding the coverage, OSHA modified the HCS in certain respects to "tailor" the Standard to fit the characteristics of the newly included industries. *Id.* at 31858. These modifications include provisions regarding multi-employer and multi-site workplaces, *see supra* note 3, and broadened exemptions from the Standard's requirements for certain drugs and consumer products, *see* 29 C.F.R. § 1910.1200 (b) (6) (vii), (viii); 52 Fed. Reg. 31862.[13]

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[13] On September 10, 1987, OSHA submitted the revised HCS to the Office of Management and Budget for review under the Paperwork Reduction Act. On the basis of its review OMB "disapproved" three provisions of the Standard: (1) the requirement that employers at multi-employer worksites exchange their MSDSs, either individually or through a central location, § 1910.1200(e)(2); (2) the new consumer product exemption, § 1910.1200(b)(6)(vii), which OMB opined should be broadened even more; and (3) the new exemption for drugs, § 1910.1200(b)(6)(viii), which OMB likewise stated should be broadened. OMB announced that these "disapproved" provisions could not go into effect. See *USWA III*, ABC Pet. App. at 29a.

In *USWA III* the Third Circuit overturned OMB's action, and directed the Secretary to put the "disapproved" provisions into effect. This decision is challenged in the certiorari petitions in Nos. 88-1075 and 88-1434. As noted above, the position of USWA and BCTD with respect to this matter is set out in their brief in opposition in No. 88-1434.

Most recently, OSHA has sought additional comments from the public, to guide the Agency in considering further modifications of the Standard; the notice of proposed rulemaking is published at 53 Fed. Reg. 29322. The period for submitting comments has now closed, and final action by OSHA is pending.

3. The Decision Below.

In *ABC v. Brock*, the Third Circuit rejected industry petitions for review of the revised HCS. That court determined, *inter alia*, (i) that all employers had received fair notice in the 1982 rulemaking proceedings that the Standard might be applied to their industries, *see* AGC Pet. App. at 10a-11a; (ii) that the "significant risk" requirement of the OSH Act was satisfied by OSHA's "significant risk finding [which] applied to all workers who would be exposed to hazardous chemicals," *id.* at 12a; (iii) that OSHA's findings satisfied the "feasibility" requirement of § 6(b)(5) of the Act, *id.* at 13a-14a; and (iv) that in adopting the ACGIH Threshold Limit Values list as one of the base lists of hazardous substances for purposes of the HCS, OSHA did not unlawfully delegate its rulemaking authority to a private body, *id.* at 15a.

ARGUMENT

The *certiorari* petitions to which we respond are like supertankers filled with soapsuds: those petitions contain a great volume of froth without any substance. As we demonstrate point-by-point, the questions presented concern in the main fact-bound issues generated by applying correct—indeed undisputed—legal principles to the situation at hand, none of which warrants this Court's attention and all of which were correctly resolved below. Moreover, while petitioners claim otherwise, it is perfectly clear that the decisions below are *not* in conflict with the decisions of this Court or of any of the other courts of appeals. The petitions should be denied.

1. The Rulemaking Notice: Petitioners challenge, as "clearly erroneous," ABC Pet. at 13, the Third Circuit's determination that non-manufacturing employers received adequate notice that the Standard here might be applied to their industries, and were thus "alert[ed] . . . of the opportunity to submit comments as to the cover-

age of their industry," *ABC v. Brock*, AGC Pet. App. at 11a.

As petitioner AGC twice acknowledges, the adequacy of a rulemaking notice is a "factual issue." AGC Pet. at 14, 27. This Court does not sit to review such fact-intensive determinations. And in any event, the Third Circuit's determination is clearly correct. As we have set forth in detail in the Statement, *OSHA's notice of proposed rulemaking explicitly identified the scope of the Standard as an open issue to be resolved in the rulemaking, and explicitly invited comments on that issue. See supra* at 4. This was reiterated by OSHA's representative at the outset of the rulemaking hearing, *id.* at 5, and was not lost on other parties, who submitted evidence on this very issue, *id.*[14]

Nor is there any force to the contention that OSHA "violated the plain language of [its] governing statute" by not publishing a proposed rule under which the HCS would apply to non-manufacturing industries. ABC Pet. at 11. *See also* NGFA/UT Pet. at 23-25. Petitioners rely on § 6(b)(2) of the OSH Act, 29 U.S.C. § 655 (b)(2), which provides that to initiate rulemaking, "[t]he Secretary shall publish a proposed rule. . . ." OSHA, of course, *did* publish a proposed rule. To be sure, the rule as proposed did not cover non-manufacturing

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[14] ABC asserts that "OSHA repeatedly made clear its position that the Standard would not apply beyond the manufacturing sector." ABC Pet. at 13, citing 47 Fed. Reg. 12101-02. But the cited passage itself makes clear that what ABC describes as OSHA's "position" was simply the Agency's *proposal*, which OSHA explicitly stated was subject to modification depending on the evidence received. *See supra* at 4.

As for petitioners' contention that "the final non-manufacturing HCS contained significant provisions nowhere mentioned in the manufacturing HCS," ABC Pet. at 12; *see also* NGFA/UT Pet. at 25 n.18, the Third Circuit correctly determined that "[t]he slight changes that were made in the standard were a logical outgrowth of the rulemaking record. . . ." AGC Pet. App. at 9a.

employers. But nothing in § 6(b)(2) suggests that a final rule must be identical to the proposed rule—either with respect to its scope or with respect to any other provision—and such a requirement "would lead to the absurdity that in rule-making . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

Thus, as ABC appears to acknowledge, the most that can be drawn from § 6(b)(2) is that a proposed rule "should be sufficiently descriptive of the '*subjects and issues involved*' so that interested parties may offer informed criticisms and comments." ABC Pet. at 11, quoting *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 48 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (emphasis added). OSHA's 1982 notice easily satisfied that test.[15]

2. **"Foreclosure"**: AGC complains that the Third Circuit held that petitioners were " 'foreclosed' by *USWA I* and *II*" from litigating two questions: first, "that [petitioners] had received adequate notice in 1982 that the standard might eventually regulate them, and [second] that OSHA properly found significant risk as to all industries based on the 1982 rulemaking record." AGC Pet. at 27.

In point of fact, as to both of these issues the Third Circuit, while stating that petitioners *should* be foreclosed from raising the matter, nevertheless proceeded to consider—and to reject on the merits—petitioners' contentions. *See* AGC Pet. App. at 11a ("The notice was sufficient to alert all employers of the opportunity to submit comments as to coverage of their industry.

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[15] Thus, the decision below does not conflict with *Ethyl Corp.* or with the other cases cited in ABC's Petition at 13 and in NGFA/UT's Petition at 23-25.

Thus the petitioners' objections to the adequacy of notice of proposed rulemaking are rejected."); *id.* at 13a ("Assuming . . . that th[e] opinions [in *USWA I* and *USWA II*] were construed as leaving open the significant risk issue, as presently presented, the outcome would be no different.") Thus, AGC was not "foreclosed" from having its contentions heard by the court below, and the question whether such "foreclosure" would have been proper is not presented.

AGC's argument is frivolous in any event. In *USWA I* and *II* AGC was in the situation that confronts any party potentially affected by a regulation when a provision of the regulation that the party supports is under review on the petition of a party which holds the opposite view. In any such case, the party that approves of the agency's decision has the choice either to intervene in support of the agency or to rely on the agency to defend its position in court. AGC argues for a third option, contending that a party that chooses to ignore such a review proceeding should retain a right to obtain "full judicial review of the standard later," AGC Pet. at 28. That contention is unsupported by any precedent, would result in a myriad of review proceedings involving the same issues, and —even worse—would leave the status of an OSHA standard in limbo until all such "later" proceedings were resolved.

3. **Significant Risk:** The Third Circuit held that in promulgating the HCS OSHA properly made a "significant risk finding [that] applied to all workers who would be exposed to hazardous chemicals." AGC Pet. App. at 12a-13a. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) (the *Benzene case*) (OSH Act embodies a requirement that a standard must be directed at ameliorating a "significant risk"). AGC and NGFA/UT assail this determination, contending that a finding of significant risk requires "industry-specific showings." AGC Pet. at i, 16; NGFA/UT Pet.

at 27-28. ABC makes a similar contention, ABC Pet. at 15.[16]

There is nothing in the OSH Act or in the *Benzene* case to suggest that a finding of significant risk must be made on an industry-specific basis. Indeed, the concept of an "industry" plays no role in the scheme of the Act.[17] It is, moreover, simply not the case that every health or safety hazard varies so dramatically from one "industry" to another as to make it necessary to analyze each industry separately in order to determine whether a significant risk exists. Rather, as the Third Court correctly recognized, where OSHA properly concludes that the hazard involved (here, lack of information on the part of employees regarding the chemical hazards encountered on the job) is *common to all industries*, the logic of the

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[16] ABC couples its "significant risk" argument with additional contentions that we discuss *infra* at 19-20.

[17] The only reference to the term "industry" in the substantive provisions of the Act is in § 6(g), 29 U.S.C. § 655(g), which states that "[i]n determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments." Nothing in the Act requires findings specific to each "industry," any more than the Act requires findings specific to each "trade," "craft," "occupation," "business," "workplace," or "work environment."

What is more, the term "industry" is not defined in the Act, nor has it been defined by petitioners, and the concept is an elusive one. For example, in the Standard Industrial Classification system, establishments are grouped into nine "divisions," which are in turn broken into more than eighty "major groups," designated by two-digit SIC Codes. See 52 Fed. Reg. 31868 (1987). Those two-digit classifications are further subdivided into three-digit and four-digit codes. The construction "industry" comprises Division C, consisting of three "major groups" and innumerable subdivisions. *Id.* AGC does not explain whether a requirement of "industry-specificity" would apply at the level of the nine "divisions," the more than eighty "major groups," or the hundreds of three- and four-digit SIC Code groupings.

situation and of the OSH Act is that the Agency may make a significant risk determination of corresponding breadth. No case has held to the contrary.[18]

Petitioners also assert that circumstances in the construction industry are such that employees in that industry, unlike their counterparts in other industries, face no significant risk when the employees are denied the information regarding chemical hazards that is required by the HCS. *See* AGC Pet. at 17-18; ABC Pet. at 15. That substantial evidence question does not warrant review and was, in any event, correctly resolved below.

OSHA found that as of 1977 the chemical source illness incidence rate in the construction industry, as reported by the Bureau of Labor Statistics ("BLS"), was 1.7 per 1,000 workers, *see* 48 Fed. Reg. 53285 (1983); and, as OSHA recognized, the incidence rates reported by BLS are seriously understated, *id.* at 53284. Of the eight major industrial sectors, only agriculture and manufacturing had higher chemical source illness incidence rates than construction. *Id.* at 53285. What is more, witnesses intimately familiar with conditions in the construction industry testified to the need for the Standard in this industry. *See* evidence cited *supra* note 7. Thus petitioners' contentions misstate the record.

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[18] In the case upon which petitioners principally rely, *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980) (*see* AGC Pet. at 16-17; NGFA/UT Pet. at 27-28; ABC Pet. at 15), medical studies affirmatively demonstrated that American *cotton gin workers* "do not suffer any long term impairment" from cotton dust exposure, 630 F.2d at 408. In those circumstances the Fifth Circuit held that studies showing the existence of such chronic impairment in *other* aspects of cotton manufacturing could not support a conclusion that a significant risk existed in *ginning*. *Id.* at 409. The holding in the case did not extend beyond that fact-bound determination; and the court certainly did not assert that OSHA must always assess significant risk industry-by-industry, or SIC Code-by-SIC Code.

4. Feasibility: Petitioners contend (1) that OSHA and the Third Circuit were required to "undertake [] an industry-by-industry analysis of feasibility," AGC Pet. at 20-21; ABC Pet. at 17; NGFA/UT Pet. at 29; and (2) that the Court of Appeals improperly shifted the burden of proof on the question of the feasibility of the HCS to petitioners, *see* ABC Pet. at 16; AGC Pet. at 19-20, NGFA/UT Pet. at 29. The first contention misstates the law and the second contention misstates the Third Circuit's holding.

A. The feasibility requirement of the OSH Act requires only that the obligations imposed by a standard must be "capable of being done." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508-09 (1981) (*"ATMI"*). In determining whether this test has been met, the Act does not require OSHA to support its findings with an industry-by-industry analysis, but rather with "substantial evidence," however derived. OSH Act § 6(f), 29 U.S.C. § 655(f).[19] Furthermore, the very cases petitioners cite recognize that OSHA cannot be expected "to prove [a] standard *certainly* feasible for *all* firms at *all* times in *all* jobs," *United Steelworkers of America v. Marshall, supra*, 647 F.2d at 1270 (emphasis by the court), cited in ABC Pet. at 17, AGC Pet. at 20, and NGFA/UT Pet. at 29. Rather, OSHA need only establish a "presumption of feasibility," 647 F.2d at 1270, which "remains rebuttable," *id. See also ASARCO, Inc. v. OSHA*, 746 F.2d 483, 496, 498-99 (9th Cir. 1984).

Of course, in some cases the nature of a standard is such that the feasibility of compliance can be expected to vary dramatically from one context to another, and there is consequently a need to assess feasibility on a context-by-context basis. This is true, for example—and a presumption of feasibility must therefore be established separately as to each affected type of work—when a

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[19] See *supra* note 17 and text thereat.

standard requires the use of engineering controls and the controls that can be implemented in one industrial setting are entirely different from those that can be implemented in another. That was the situation in *Steelworkers v. Marshall* and in each of the cases cited by petitioners, *see* AGC Pet. at 20-21; ABC Pet. at 17; NGFA/UT Pet. at 29. But petitioners overread those decisions just as they overread the "significant risk" cases discussed *supra* at 16 and n.18. The essence of the matter is that no decision holds that an industry-by-industry analysis is required in every case, without regard to the nature of the standard in question; and, as we have shown, nothing in the statute would support such a requirement.

In this case, the obligations imposed by the HCS on petitioners are very modest, and are of such a nature as to be well within the capabilities of any industry, *see supra* at 2-3. In these unique circumstances the Third Circuit was entirely justified in dismissing petitioners' claims of infeasibility with these words:

> When OSHA adopts standards relating to activities on the frontiers of scientific knowledge, feasibility issues may be difficult. Here, however, the main components of the hazard communication standard, except for chemical manufacturers, are training of workers and the maintenance of labels and material safety data sheets furnished by chemical manufacturers. These obligations hardly approach the limits of feasibility. [*ABC v. Brock*, AGC Pet. App. at 14a.]

B. Nor did the Third Circuit improperly shift any evidentiary burden to petitioners with respect to the feasibility issue. Because, as discussed, there was ample basis for concluding that the modest obligations imposed by the HCS are feasible for all industries, the Third Circuit's holding that the Standard should apply to all industries except where OSHA "can state reasons why such application would not be feasible," *USWA I*, 763 F.2d at

739, AGC Pet. App. at 51a-52a, simply represents a proper application, in the factual context of this case, of the approach articulated in the very cases petitioners endorse. For those cases hold that OSHA need only make a finding of "*general* feasibility," *Steelworkers v. Marshall*, *supra*, 647 F.2d at 1272 (emphasis added); *ASARCO, Inc. v. OSHA*, *supra*, 746 F.2d at 498, while leaving open the possibility that the general finding may be rebutted by evidence of *infeasibility* in a particular setting. *See supra* at 17.

In any event, OSHA did not merely find an absence of evidence of *infeasibility*, but affirmatively found that compliance *is feasible* in all industries. *See* 52 Fed. Reg. 31855-57 (1987). Thus when all is said and done, petitioners' arguments reduce once again to a contention that OSHA and the Third Circuit gave less weight than petitioners would like to the allegedly unique circumstances of their industry. *See supra* at 16. OSHA however fully explained its rejection of petitioners' position, *see* 52 Fed. Reg. 31859 (1987), and this factual dispute presents no question worthy of this Court's review.

5. Reasonable Necessity: ABC and AGC raise a series of vaguely formulated—and, as we show, insubstantial—arguments based on § 3(8) of the Act, 29 U.S.C. § 652(8), which defines an "occupational safety and health standard" as a standard the requirements of which are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *See* ABC Pet. at 14-16; AGC Pet. at 21-23.

A. ABC relies on the portion of the *ATMI* case, 452 U.S. at 536-40, striking down an earnings-protection provision in the Cotton Dust Standard. *See* ABC Pet. at 14.[20] The infirmity the Court found in that provision was that:

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[20] The standard required employers to provide employees who were physically unable to wear a respirator the opportunity to

> OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the "goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator." [452 U.S. at 538].

In other words, the Court held that OSHA may not promulgate a provision designed solely "to repair general unfairness to employees that is unrelated to achievement of health and safety goals." *Id.* at 540. The HCS contains no such provisions.[21]

B. The *ATMI* Court, while holding that § 3(8) cannot be construed to "countermand" the specific requirement of § 6(b)(5) that in promulgating standards for toxic materials OSHA must promulgate the most protective standard feasible, 452 U.S. at 513,[22] suggested that § 3(8) "might come into play as an additional restriction" if OSHA were to impose requirements in a standard that were entirely *redundant*, such that "the *same reduction* in health risk" would be achieved in the

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transfer to another position. The challenged portion of that provision required "the employer [to] guarantee that the employee [who transfers] suffers no loss of earnings or other employment rights or benefits." 452 U.S. at 537.

[21] As long as a provision promulgated by OSHA has a health-protective purpose and is consistent with the Agency's mandate to promulgate the most protective standard that is feasible, the provision need only satisfy the familiar test that regulatory action must be "reasonably related to the purposes of the enabling legislation." *Forging Industry Assn. v. Secretary of Labor*, 773 F.2d 1436, 1447 (4th Cir. 1985) (*en banc*), quoting *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). *Accord, Steelworkers v. Marshall, supra*, 647 F.2d at 1237. There is no contention here that the HCS fails that test.

[22] *See also National Grain and Feed Ass'n v. OSHA*, slip op. at 5-7 (5th Cir. Jan. 24, 1989), *modifying opinion published at* 858 F.2d 1019 (1988); *Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1269 (D.C. Cir. 1988); *ASARCO, Inc. v. OSHA*, 746 F.2d 483, 497-98 (9th Cir. 1984).

absence of the superfluous requirements. 452 U.S. at 514 n.32 (emphasis added).[23] *Cf. ASARCO, Inc. v. OSHA*, 746 F.2d 483, 497-98 (9th Cir. 1984). AGC asserts that OSHA transgressed that *possible* limitation here and that this case is an "ideal vehicle" for settling the scope of § (8). AGC Pet. at 21. This case does not, however, raise any question as to § 3(8)'s scope.

All parties to these cases have proceeded on the assumption that if "the *same reduction* in health risk" (*ATMI, supra*) would occur in the absence of the Standard, the Standard would be invalid. Petitioners' contention that the HCS is subject to attack on this ground failed not because of any disagreement on the governing legal rule but because the contention is unsupportable on the facts.[24]

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[23] In the same footnote the Court left open the question "[whether] § 3(8) might not require the balancing of costs and benefits for standards promulgated under provisions other than § 6(b)(5) of the Act." *Id.* at 513 n.32. Since the HCS was promulgated under § 6(b)(5) no such § 3(8) question is presented here. A related question is whether such balancing might be required or permitted in the case of standards dealing with *safety*, as distinguished from *health*; that is the issue with which "the Fifth Circuit has recently struggled," AGC Pet. at 22-23. *See National Grain and Feed Ass'n v. OSHA, supra.* Since the HCS is a *health* standard, *see* 48 Fed. Reg. 53320 (1983); *USWA I*, AGC Pet. App. at 40a-42a, the question presented in that case is not presented here.

[24] Thus, ABC contends that there is no need for the HCS in construction because construction contractors are already subject to a training requirement. ABC Pet. at 15, citing 29 C.F.R. § 1926.21. This argument is patently lacking in merit. OSHA properly determined that effective hazard communication requires three components, and that "[n]o one of these three components alone—labels, material safety data sheets, or training—can be demonstrated to be completely effective in communicating hazards." 48 Fed. Reg. 53311 (1983). *See also* 52 Fed. Reg. 31858-59 (1987) (discussing the need for MSDSs in the construction industry in order to make training programs effective). The Third Circuit was therefore correct in concluding that the provisions of the HCS which "require[] . . . maintenance on the jobsite of information on

6. Setting Rulemaking Priorities: AGC asserts that in *USWA I* and *USWA II* the Third Circuit intruded on the administrative province by interfering with OSHA's setting of rulemaking priorities. AGC Pet. at 24-26.

As a threshold matter AGC did not advance this contention below, and therefore cannot do so now.[25] It can moreover easily be shown that AGC's contention is unfounded and, out of caution, we make that showing now.

Unlike cases where parties seek to compel OSHA to undertake a rulemaking the Agency does not wish to undertake, or to expedite a rulemaking the Agency does not wish to expedite (see cases cited in AGC Pet. at 26), *USWA I* involved a challenge to OSHA's resolution of an issue that was squarely presented and resolved in a *completed* rulemaking that OSHA undertook of its own accord. In *USWA I* no party was seeking to dictate how OSHA's rulemaking resources should be allocated; the

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[chemical] risks can only make the existing training more effective." *AGC v. Brock*, AGC Pet. App. at 13a.

AGC complains about the requirement that MSDSs must be "physically present on every construction jobsite," AGC Pet. at 22; but as OSHA determined, this is needed so that "[e]mployees will . . . be able to access the information as required." 52 Fed. Reg. 31865 (1987) (discussing written hazard communication programs). *See also id.* at 31866 (discussing MSDSs).

And, AGC's contention that the HCS requires employers to provide "redundant hazard training to experienced construction tradesmen each time they move from job to job," AGC Pet. at 22, grossly exaggerates the actual requirements of the HCS in this regard—requirements that are "performance-oriented" and flexible. 52 Fed. Reg. 31866 (1987), 48 Fed. Reg. 53311-12 (1983).

[25] AGC's briefs to the Third Circuit did not even cite the provision of the OSH Act, § 6(g), 29 U.S.C. § 655(g), upon which AGC now seeks to base its argument. What is more, the case in which AGC has sought certiorari, *ABC v. Brock*, is, by AGC's own account, "not 'the same case' " as *USWA I* and *II*. *See* AGC's Reply Brief in *ABC v. Brock* at 7. Accordingly, AGC cannot, by petitioning for certiorari in *ABC v. Brock*, bring before this Court the rulings in *USWA I* and *II*.

only question presented was whether a standard actually issued by the Agency satisfied the requirements of § 6(b)(5). *See supra* at 7-8. As the Third Circuit recognized, OSHA's authority to set rulemaking priorities, embodied in § 6(g) of the Act, 29 U.S.C. § 655(g), does not shield the Agency from being called to account when a standard promulgated by the Agency for toxic substances provides less protection than § 6(b)(5) mandates, whether the failure is in not providing proper protection to covered employees or in not properly covering employees. *USWA I*, AGC Pet. App. at 40a, *citing United Steelworkers of America v. Marshall, supra*, 647 F.2d at 1309-10. *See also Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1270-72 (D.C. Cir. 1988); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986). The decisions are uniform on this point.[26]

The decision in *USWA II*, which required OSHA to complete the reconsideration required by *USWA I* without the unnecessary delay that would be occasioned by another round of notice-and-comment, represented, in turn, a straightforward application of the Third Circuit's express statutory authority to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), bolstered by that court's authority to enforce its judgment in *USWA I* by issuing "all writs necessary or appropriate in aid of" its jurisdiction, 28 U.S.C.

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[26] The Third Circuit's reliance on the D.C. Circuit's decision in *Steelworkers v. Marshall* is answer enough to AGC's contention that the Third Circuit's resolution of this issue "squarely conflict[s] with several rulings of the D.C. Circuit, which has articulated a much more exacting standard for judicial intervention into OSHA's priority-setting." AGC Pet. at 26.

In *Steelworkers v. Marshall* the D.C. Circuit made it clear that a decision to exclude an industry from a standard, made after a rulemaking in which that point was at issue, is subject to full judicial review and must be shown to comport with the record evidence and the statutory mandate. *See* 647 F.2d at 1309-10.

§ 165(a). *See USWA II*, AGC Pet. App. at 68a. AGC's assertion that the court below was simply seeking to impose on OSHA its "own notion of which procedures are 'best,'" AGC Pet. at 24, quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is empty rhetoric that has no basis in the Third Circuit's order.

7. Delegation to a Private Party: NGFA contends that OSHA "delegat[ed] . . . its rulemaking authority to a private entity," NGFA/UT Pet. at i, 9, by adopting the Threshold Limit Values list of the American Conference of Governmental Industrial Hygienists (ACGIH), as one of the base lists of hazardous substances covered by the HCS; and NGFA argues that this "delegation" violated both the OSH Act, NFGA/UT Pet. at 10-19, and the Constitution, *id.* at 19-22. This contention is not worthy of further review on two independent grounds.

A. The "delegation" issue is of no present practical moment by reason of a recent rulemaking action by OSHA. NGFA has attacked OSHA's alleged delegation of authority only with regard to the inclusion of *grain dust* as a hazardous substance.[27] As a result of a new standard for Air Contaminants published by OSHA on January 19, 1989 (amending 29 C.F.R. Part 1910, Subpart Z), *grain dust is now covered by the HCS under the provision that covers all substances included in the Air Contaminants Standard* as well as under the provision providing coverage by reason of the ACGIH listing. *See* 29 C.F.R. § 1910.1200(d)(3), discussed *supra* at 2-3. OSHA took the step of adding grain dust to the Air Contaminants Standard after reviewing the "substantial amount of information . . . submitted to the record [of

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[27] This was the extent of NGFA's challenge case in the court below as well as in this Court. Indeed, NGFA would lack standing to challenge the HCS as the Standard applies to anything other than grain dust.

the Air Contaminants rulemaking] addressing the health evidence [with respect to grain dust]," and determining "that an exposure limit for grain dust is necessary to reduce the significant risk of adverse respiratory effects associated with exposure to this material." 54 Fed. Reg. 2510 (Jan. 19, 1989).

Against this background, a ruling in NGFA's favor on its "delegation" claim would have no effect on NGFA's hazard communication obligations.[28] Thus the "delegation" question is only of academic interest in this case.

B. Turning to the merits, NGFA seeks to extend the delegation concept to new lengths by arguing that OSHA "delegated its rulemaking authority" to a private entity by adopting that entity's scientific determination that certain substances are hazardous. The Government relies on the determinations of private scientists from Newton on down every day. And NFGA does not cite a single case in which this Court or any other has struck down, on statutory or constitutional grounds, *any* regulation as an unlawful delegation of authority to a private entity, much less a regulation involving the kind of normal and benign reliance on private scientific learning involved here.[29]

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[28] Even without the recent amendment to Subpart Z, it is far from clear that NGFA would have standing to attack the use of the ACGIH list. As NGFA has acknowledged, grain dust is covered under the HCS as a *physical* hazard, due to its combustibility. *See* Exh. 2-97, OSHA Docket H-0221 (NGFA requests exemption for grain dust on the ground that its combustibility is "unmistakable"). *See also ABC v. Brock*, AGC Pet. at 13a ("As to the risks posed by grain dust, the propensity of grain elevators to blow up has been well documented"). Grain dust would therefore be covered by the HCS as a *physical* hazard even if the dust were not listed as a *health* hazard by ACGIH or OSHA. *See* 29 C.F.R. § 1910.1200(c), 52 Fed. Reg. 31879 (1987) (defining "hazardous chemical" as "any chemical which is a physical hazard or a health hazard").

[29] Insofar as the statutory question NGFA seeks to raise is concerned, the most that can be said of § 6(a), 29 U.S.C. § 655(a),

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted,

ELIHU I. LEIFER
VICTORIA L. BOR
CHRISTOPHER S. RICHARDSON
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

GEORGE H. COHEN
JEREMIAH A. COLLINS
JOHN ROTHCHILD
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

* Counsel of Record

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and of its legislative history, discussed at length in NGFA Pet. at 14-17, is that OSHA is not *compelled*, and perhaps not permitted, to adopt ACGIH *standards* without engaging in § *6(b) rulemaking*. Here, as noted, OSHA did not adopt any ACGIH *standard*. Rather, *after a § 6(b) rulemaking*, OSHA simply determined that certain scientific determinations by ACGIH should be adopted as one of the mechanisms for triggering the applicability of substantive regulatory requirements *crafted by OSHA*.

(6) (5)

Nos. 88-1075 and 88-1434

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
Respondents.

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

ELIHU I. LEIFER
VICTORIA L. BOR
CHRISTOPHER S. RICHARDSON
1125 15th Street, N.W.
Washington, D.C. 20005

GEORGE H. COHEN
JEREMIAH A. COLLINS
JOHN ROTHCHILD
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
* Counsel of Record

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QUESTION PRESENTED

The petitions take issue with the Third Circuit's ruling that "information collection requests" subject to approval by the Office of Management and Budget under the Paperwork Reduction Act do not include regulations under which information is to be provided only to private parties rather than to government agencies. The question presented is whether that ruling—which is not in conflict with that of any other circuit and which concerns a subject that is extremely unlikely to be the subject of litigation—is worthy of review in a case in which its resolution would not affect the judgment below.

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IN THE

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

Respondents United Steelworkers of America, AFL-CIO, CLC ("USWA") and Building and Construction Trades Department, AFL-CIO ("BCTD") submit this brief in opposition to the petitions for certiorari in Nos. 88-1075 and 88-1434, which seek review of the decision

in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988).[1]

STATUTES INVOLVED

In addition to the sections of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.* ("PRA") which are reproduced in the Petition in No. 88-1434 at 1-3, this case also involves § 3504(a) of the PRA, 44 U.S.C. § 3504(a), which provides as follows:

> The Director shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy and security of records, agency sharing and dissemination of information, and acquisition and use of automatic data processes, telecommunications, and other information technology for managing information resources. The authority of the Director under this section shall be exercised consistent with applicable law.

The case involves as well the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("OSH Act"), and particularly §§ 6(b)(5) and 6(b)(7), 29 U.S.C.

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[1] The petition of Associated Builders and Contractors ("ABC") also seeks review of the decision in *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988). Review of the latter decision is sought as well by other industry petitioners in Nos. 88-1070 and 88-1385.

USWA and BCTD have today filed a brief in opposition in Nos. 88-1070, 88-1075 and 88-1385, which demonstrates that further review of the decision in *Associated Builders and Contractors v. Brock* is not warranted. That would remain the case even if, contrary to our submission, the Court were to grant certiorari to review the decision in *United Steelworkers of America v. Pendergrass*. Although the two cases grow out of the same OSHA Standard, the legal issues presented in each are completely distinct.

§§ 655(b)(5) and (7). Those sections provide in pertinent part as follows:

Section 6(b)(5):

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Section 6(b)(7):

> Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.
>
> * * * *
>
> The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical exami-

nations, as may be warranted by experience, information, or medical or technical developments acquired subsequent to the promulgation of the relevant standard.

STATEMENT

1. History and Provisions of the Hazard Communication Standard

In November 1983 the Occupational Safety and Health Administration ("OSHA") promulgated a Hazard Communication Standard ("the Standard" or "HCS"). The Standard is based on OHSA's determination that lack of knowledge on the part of employees regarding the chemical hazards the employees confront on the job is one of the prime causes of occupational illness and injury. *See* 48 Fed. Reg. 53282-84, 53321 (1983); 52 Fed. Reg. 31853, 31868-69 (1987).[2]

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[2] The Standard requires chemical manufacturers and importers to evaluate chemicals they produce and import to determine if they are hazardous. 29 C.F.R. § 1910.1200(d)(1). For each chemical determined to be hazardous, a material safety data sheet ("MSDS") must be developed and provided to employers, § 1910.1200(g)(1), (6); and containers of hazardous chemicals must be labeled by the manufacturer or importer with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1).

With respect to so-called "downstream" employers—*i.e.*, employers other than chemical manufacturers, importers and distributors—the HCS imposes much less extensive obligations. Those employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers and importers. Thus, these employers must (1) maintain copies of the MSDSs they receive, and make them accessible to employees at the worksite, § 1910.1200(g)(8); (2) see to it that containers of hazardous chemicals in the workplace are labeled with information corresponding to that provided on the labels arriving from the chemical manufacturers and importers, § 1910.1200(f)(5); (3) provide employees with information and training on hazardous chemicals, § 1910.1200(h); and (4) develop and maintain a written hazard communication program that describes how the employer will meet the requirements described above, § 1910.1200(e)(1).

The Office of Management and Budget (OMB), purporting to act under the authority of the Paperwork Reduction Act (PRA), reviewed the provisions of the 1983 Standard and approved them without exception. *See* 48 Fed. Reg. 53280 (1983).

The 1983 Standard covered only chemical manufacturers, importers and distributors, and employers in the manufacturing sector of the economy as defined by Standard Industrial Classification (SIC) Codes 20 through 39. On petitions for review of the Standard filed in the Third Circuit, that court held, *inter alia*, that OSHA's rationale for confining the Standard to the manufacturing sector was legally invalid, and the Secretary was directed "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*"USWA I"*). When OSHA delayed in carrying out that mandate, the Third Circuit issued a second decision directing the Agency to act on the basis of the original rulemaking record and to complete its reconsideration within sixty additional days. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*).

Subsequently, on August 24, 1987, OSHA promulgated the revised Standard, extending the coverage of the HCS to all employers covered by the Act. 52 Fed. Reg. 31852-86 (1987). With three modifications that are pertinent here, the substantive provisions of the revised HCS are the same as those approved by OMB in 1983; those provisions simply apply now to all employers, rather than only those engaged in manufacturing.

The three modifications are as follows. First, the revised Standard includes a new provision dealing with multi-employer worksites, which provides that if circumstances are such that the employees of one employer may

be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter must either provide copies of the MSDSs for those chemicals to the other employer, "or . . . make [the MSDSs] available at a central location in the workplace." § 1910.1200 (e) (2). Second, OSHA added a provision exempting from the coverage of the HCS any drug that is "in solid, final form for direct administration to the patient." § 1910.1200 (b) (6) (viii). Third, OSHA added an exclusion for any "consumer product," as defined in the Consumer Product Safety Act, "where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers." § 1910.1200 (b) (6) (vii).

2. OMB's Disapproval of Three Provisions of the Standard

On September 10, 1987, OSHA submitted the revised Standard to OMB for review. On October 23 the Department of Labor was notified that OMB disapproved the three new provisions just described.

With respect to the provision requiring employers at multi-employer worksites to exchange MSDSs in certain circumstances, OMB devoted most of its discussion to comments that had been made by industry groups regarding the alleged difficulty of complying with this provision, *see* Pet. App. at 30a-32a, including, for example, a complaint that "a minimum of several file cabinets would be required . . . ." *Id.* at 32a. OMB asserted that OSHA had not "demonstrate[d] the practical utility for th[is] requirement," *id.*, and opined that "the requirement does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces," *id.*

With respect to the exclusion of certain drugs, OMB's objection related only to employers "[o]utside the manufacturing sector." Pet. App. at 37a. As to those employers, OMB asserted that OSHA "does not explain why all drugs regulated by the FDA are not exempted . . . , *id.*; and OMB expressed the view that "coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility," *id.*

With respect to consumer products, OMB declared it was not enough for OSHA to exclude from the HCS products that are used in the workplace in the same manner, and with the same duration and frequency of exposure, as the products are used by consumers; OMB insisted that OSHA should "exempt any substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product.*" Pet. App. at 36a (emphasis added). OMB justified its approach largely on the ground that it would simplify the compliance tasks of employers. *Id.* at 34a-36a.

In the wake of OMB's action USWA and Public Citizen, Inc. filed in the Third Circuit a "Motion for Further Relief With Respect to Prior Decisions of This Court," urging that the Secretary of Labor and the Director of OMB be "enjoin[ed] . . . from taking any further action in derogation of the [Third Circuit's] orders in [*USWA I* and *II*]," and urging that the Secretary and the Director be held in civil contempt.

3. OSHA's Rejection of OMB's Conclusions

While that motion was *sub judice* OSHA published a Notice of Proposed Rulemaking in which, *inter alia*, the Agency solicited public comment on OMB's critique of the three provisions of the HCS at issue. *See* 53 Fed. Reg. 29822-56 (1988). Without explicitly rejecting OMB's views, OSHA explained in detail the justifications

for each of the three provisions OMB had disapproved, and proposed that no changes be made in the provisions notwithstanding OMB's views.

With respect to multi-employer worksites, OSHA noted that several participants in the rulemaking, including construction industry employer associations, had emphasized the importance and feasibility of making MSDSs available at the workplace for *all* hazardous chemicals to which an employee may be exposed, whether the chemical is brought to the site by his own employer or by another employer. *Id.* at 29843-44. The Agency further noted that its Advisory Committee on Construction Safety and Health had reviewed the multi-employer worksite provision as promulgated by OSHA, and had raised no objections to "the provision for MSDSs to be made available on multi-employer worksites." *Id.* at 29844. OSHA stated that the Agency "still believes that the multi-employer worksite provision is critical to the proper functioning of the rule, and that MSDSs are necessary to ensure that proper information is available to both employers and employees." *Id.* at 29845.[3] However, the Agency invited further comment on this issue and on "OMB's suggested approach." *Id.*

With respect to the scope of the exclusion of drugs, OSHA noted that the exclusion the Agency had originally fashioned (covering all drugs in solid form) is quite broad, *id.* at 29838-39, and that other drugs were not excluded "in recognition of the fact that there are various types of workers who may be exposed to drugs in hospitals or pharmacies," *id.* at 29839, and "since drugs are designed to be biologically active, OSHA wants to ensure that employees will be properly protected." *Id.* OSHA cited recent experience reported by the American Industrial Hygiene Association confirming that exposure

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[3] Although OMB had suggested that labels and training could substitute for MSDSs, *see* Pet. App. at 32a; Pet. at 25 n.15, OSHA cited testimony establishing that such is not the case. 53 Fed. Reg. 29844.

of health care employees to drugs that are not in solid form can indeed cause serious occupational health problems. *Id.* Accordingly, although OSHA proposed one modification of the provisions of the Standard with respect to drugs,[4] the Agency did not propose to adopt OMB's approach of "totally exempting all drugs from any coverage under the rule in terms of the non-manufacturing sector workplaces," but did invite comment on this suggestion. *Id.* at 29839.

With respect to consumer products, OSHA explained in detail (i) that the labels and inserts provided with consumer products generally do not include the kind of hazard information that is needed when the product is used in an occupational setting, and (ii) that so-called "consumer products" are responsible for an extremely large number of occupational illnesses and injuries. *Id.* at 29834-35. The Agency observed that the rulemaking record had conclusively established those points. *Id.* at 29835-36. OSHA reiterated that this is why the Standard provides an exemption "tied to type and extent of exposure," *id.* at 29836, which "strikes a balance between the practical considerations of acquiring and maintaining material safety data sheets on CPSC regulated products . . . , and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate." *Id.*, quoting 52 Fed. Reg. 31863. OSHA therefore did not propose any change in the consumer product exemption as originally promulgated, but again invited comment on OMB's contrary view. *Id.* at 29838.

4. The Decisions Below

Thereafter, on August 19, 1988, the Court of Appeals granted USWA and Public Citizen's motion for further relief in part, holding that "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with [the

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[4] The proposal would allow certain FDA-approved documents to be considered MSDSs for purposes of the HCS. *Id.* at 29839.

Third Circuit's] orders [in *USWA I* and *II*]," Pet. App. at 12a-13a, and directing the Secretary to publish forthwith a notice that the three provisions disapproved by OMB "are now effective." Pet. App. at 13a. The court declined, however, to hold the agency officials in contempt. *Id.*

In its opinion the Third Circuit determined that OMB's action is not justified by the PRA. In reaching that result the court relied on *two independent grounds*, Pet. App. at 8a: *first*, that the provisions of the HCS at issue do not constitute "information collection requests" within the meaning of 44 U.S.C. §§ 3504(c)(1) and (2), and therefore are not subject to OMB review and approval; and *second*, that OMB's action is foreclosed by 44 U.S.C. § 3518(e), which provides that the PRA does not increase OMB's authority "with respect to the substantive policies and programs of . . . agencies . . . ," and 44 U.S.C. § 3504(a), which provides that OMB's authority "shall be exercised consistent with applicable law." *See* Pet. App. at 8a-11a.

ARGUMENT

The Government's petition testifies to the raw force the Budget Bureau brings to getting its way, right or wrong, within the Executive Branch and the inability of the Cabinet-level Departments to temper OMB's will for power with more mature and balanced professional judgments. As we now show, measured by the established criteria for invoking this Court's jurisdiction, this is a *certiorari* petition that should never have been filed and that should be denied.[5]

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[5] The ABC *certiorari* petition in No. 88-1075, which, as we noted at the outset, also covers questions raised in a companion case below, makes essentially the same points as the Government's petition in No. 88-1434 and does so without diverging from, or adding to, the Government's arguments. For simplicity's sake, we have therefore organized our response around the Government's papers. Unless otherwise noted, references to "Pet." and "Pet. App." are to the petition in No. 88-1434 and the appendix to that petition.

1. The question on which the Government concentrates its attention—the meaning of the term "information collection request" in the Paperwork Reduction Act (PRA)—is presented only indirectly and as the result of an idiosyncratic proceeding quite unlikely to be replicated. Moreover, the meaning of that term is not determinative of any substantive issue between the parties to this case; the decision below rests on multiple, alternative grounds and the Government does not come close to showing that these alternative bases are in any way infirm.

(a) As the Government's petition recognizes, "[t]he specific issue before the [Third Circuit] was whether the Secretary [of Labor] had complied with the court's previous order requiring the Secretary to extend a hazard communication standard to the non-manufacturing sector." Pet. at 20. And, the Third Circuit's ultimate determination was that "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with th[at] order[]." Pet. App. at 12a-13a.

That determination rests *primarily* on the Third Circuit's construction of its own prior orders and on that court's judgment of what was required of the Secretary of Labor in the way of compliance after a long drawn out proceeding that had twice before resulted in judicial proceedings, and only *secondarily* on the Third Circuit's views concerning OMB's authority under the PRA.

Indeed, except in the truly extraordinary context presented here, it is unlikely in the extreme that the PRA will ever generate any legal controversy, much less a recurring controversy, requiring this Court's intervention. In the normal course, OMB review of "paperwork" requirements under the PRA begins *when a notice of proposed rulemaking is published.* The PRA provides that agencies are to give OMB notice of such proposed rulemaking, and that OMB must file public comments in response to the notice or lose all authority to disapprove any provisions of the proposed regulation. 44 U.S.C. § 3505(h)(4). If public comments on the proposal are

submitted, *see* 44 U.S.C. § 3505(h)(1), (2), OMB may then disapprove a provision of the agency's final rule only "if the agency's response to [OMB's] comments . . . was *unreasonable*." 44 U.S.C. § 3505(h)(5)(C) (emphasis added).

To put this in concrete terms, if the statements in OMB's decision disapproving the three provisions at issue here had been submitted as comments on a proposed rule, and if OSHA had rejected OMB's suggestions for the reasons that OSHA has now expressed in the August 1988 Federal Register statement discussed *supra* at 7-9, OSHA's position could not be characterized as "unreasonable," and OMB would therefore have had no right under the PRA to disapprove OSHA's decision. That this sequence of events did not occur here is due solely to the unique procedural posture of this rulemaking. *See supra* at 5. In the ordinary situation, then, the provisions of the PRA itself would have prevented the OMB/OSHA clash that gave rise to the need for a judicial resolution.[6]

(b) While the Government's petition strives to make it appear that this case turns on the proper construction of "information collection request," in fact the Third Circuit also found OMB's action to be invalid on an independent ground: *viz.* that OMB had transgressed the limitations in the PRA requiring OMB to exercise its

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[6] The Government's petition asserts that even "[a]pplied only to the specific agency action at issue here, [the decision below] would have substantial consequences: it would eliminate OMB paperwork review of one of the most significant paperwork requirements in regulatory history." Pet. at 17. That is pure hyperbole.

Only three provisions of the HCS are at issue here, and those three provisions hardly constitute "one of the most significant paperwork requirements in regulatory history." What is more, now that OSHA has so thoroughly debunked OMB's objections to those provisions and has slated further rulemaking with respect to those objections, *see supra* at 7-9, it is far from clear that OMB's erroneous views would have had "substantial consequences" in terms of the ultimate content of the HCS even if the Third Circuit's decision had never been written.

authority "consistent with applicable law," 44 U.S.C. § 3504(a), and providing that the PRA "shall not be interpreted as increasing . . . the authority of . . . [OMB] . . . with respect to the substantive policies and programs of . . . agencies. . . .," 44 U.S.C. § 3518(e).

The Government attempts to wish away these restrictions on OMB's authority in a footnote, asserting that "[t]hese provisions simply recognize that an agency retains authority to determine its regulatory objectives, while OMB has a responsibility to review whether the agency has chosen effective information collection methods to *achieve* those objectives." Pet. at 24 n.14 (emphasis in original).

Even if this distinction between "objectives" and "methods" had any operational content, more than the Government's *ipse dixit* would be required to establish the unlikely proposition that when Congress referred to "applicable law" (§ 3504(a)) and "substantive policies and programs" (§ 3518(e)), the Legislature was referring only to regulatory "objectives," and not regulatory "methods."[7] The phrase "policies *and programs*" is most naturally read to include both "objectives" *and* "methods." And once past that ineffectual effort to cut all meaning out of the PRA's limitations on OMB's authority, the Government offers nothing to demonstrate that the decision below is wrong in this regard.

No such demonstration could be made. The OSH Act not only gives *OSHA*, rather than OMB, the authority to

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[7] The only decision cited in the Government's petition as mentioning § 3518(e)—and as far as we are aware, the only decision other than this one to discuss any aspect of that provision—is *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *petition for cert. pending* (No. 88-849). *See* Pet. at 28. And that case held only that § 3518(e) does not "completely exempt any civil rights activity from OMB's data collection supervision." *Id.* at 1454-55.

The Government cites *no* other case construing § 3504(a), and as far as we are aware there is no such case.

promulgate occupational safety and health standards,[8] but also specifies in no uncertain terms the manner in which OSHA is to resolve the tension between costs and employee protection in fashioning standards regarding toxic materials and harmful physical agents, and, in particular, in fashioning hazard communication requirements. OMB's action here plainly transgressed those statutory mandates.

As this Court held in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) (*"ATMI"*):

> [Section] 6(b)(5) directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect then . . . , Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard . . . that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5).

And, insofar as hazard comunication is concerned, a second provision of the OSH Act, § 6(b)(7), further requires that standards "*shall prescribe* the use of labels or other appropriate forms of warning as are necessary to *insure* that employees are apprised of *all hazards* to which they are exposed, relevant symptoms and appro-

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[8] Congress made a considered judgment that the authority to determine the content of occupational safety and health standards should be entrusted to the Secretary of Labor. This was the approach adopted in the bill passed by the Senate. The House bill, on the other hand, called for an independent board to set standards. "The question of the separate standards board was the most controversial issue confronting the Conference Committee; ultimately, the House of Representatives receded and the Senate approach, giving the Secretary of Labor authority to issue occupational safety and health standards, subject to review in the U.S. courts of appeals, was adopted." B. Mintz, *OSHA: History, Law, and Policy* 25-26 (1984).

priate emergency treatment, and *proper conditions and precautions of safe use or exposure.*" 29 U.S.C. § 655 (b) (7) (emphasis added).[9]

To put it mildly, there is no indication that OMB sought to adhere to the mandate of § 6(b) (5) that standards must provide the greatest level of protection that is "capable of being done," *ATMI*, *supra*, 452 U.S. at 509, or the mandate of § 6(b) (7) that hazard communication mechanisms must "insure" that employees are apprised of "all hazards" and of "proper conditions and precautions of safe use or exposure." Instead, OMB's chief preoccupation was with industry claims of burden or inconvenience, even at the mundane level of, *e.g.*, the need to obtain file cabinets, *see supra* at 6-7, and with a fetishistic desire to ensure that employers be subject to the requirements promulgated by only one regulatory agency, even where the requirements of that agency do not purport to protect *employees*, *see supra* at 7.

Although this point holds true with respect to OMB's disapproval of each of the three regulatory provisions at issue, it is perhaps most obvious with respect to the coverage of consumer products. OSHA's analysis of OMB's comments on this subject, together with the record evidence, establish that OMB is simply wrong in assuming that the labels prescribed by the Consumer Product Safety Commission provide the kind of information that *employees* need if they are to use a product safely *in industrial settings* and *at industrial levels of exposure*. *See supra* at 9. In particular, to use the words of § 6(b) (7) itself, CPSC labels do not provide information as to "proper conditions and precautions of safe use or exposure" in the industrial setting. *See* 53

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[9] The final sentence of § 6(b)(7) also directs OSHA to consult on such matters with "the Secretary of Health and Human Services" (*i.e.*, the National Institute for Occupational Safety and Health, an expert scientific body created by the OSH Act within the Department of Health and Human Services, *see* 29 U.S.C. §§ 669(e), 671). The statute does not provide for any such consultation with OMB.

Fed. Reg. 29834, 29835. OSHA's treatment of consumer products was carefully tailored to address this reality. *See supra* at 6, 9. Yet OMB, with hardly a backward glance, ordered OSHA to exempt from the HCS every "substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product.*" Pet. App. at 36a (emphasis added). It cannot seriously be maintained that this approach is consistent with §§ 6(b)(5) and (7).

Thus, even if the Government were correct that the provisions of the HCS at issue constitute "information collection requests," the Third Circuit's conclusion that OMB's disapproval of those provisions was invalid would be unaffected, because, on the facts of this case, OMB's action improperly interfered with OSHA's "substantive policies and programs" (§ 3518(e)), and was "[in]consistent with applicable law" (§ 3504(a)) as embodied in §§ 6(b)(5) and (7) of the OSH Act.

(c) The Government's main complaint with the decision below is that OMB's authority to review "information collection requests" encompasses not only regulations that require the provision of information *to a government agency*, but also regulations that require the provision of information *solely to private parties*. *See* Pet. at i, 17-19, 22-24, 27-28. But even assuming that to be so, two of the three provisions of the HCS at issue here, and part of the third, are outside the PRA's scope because the provisions do not require the regulated employers to provide any information at all. As the Third Circuit emphasized, these provisions essentially require employers "not to *compile*, but simply to *transmit* information." Pet. App. at 9a (emphasis added).

Thus, the provision regarding multi-employer worksites requires employers to make available to each other the MSDSs the employers have received from chemical manufacturers and importers, and OMB did *not* question the requirements concerning the preparation of MSDSs imposed on manufacturers and importers. The provision

regarding drugs was disapproved only with respect to the non-manufacturing sector, and the HCS does not require employers in that sector to develop information, but only to retain the MSDSs and labels prepared by chemical manufacturers and importers.[10]

The question whether these provisions constitute "information collection requests" within the meaning of the PRA therefore reduces to whether the PRA applies to regulations that merely require a party to *transmit* information *prepared by another*. The Government's petition, however, does not identify this exceedingly narrow technical point of dispute as a Question Presented, *see* Pet. at i, and the petition addresses the matter only in a cryptic footnote which quibbles with the Third Circuit's characterization of the Standard's provisions. *See* Pet. at 22-23, n.11.[11]

The reason for this becoming reticence is that the Third Circuit is plainly correct in recognizing that the PRA does not encompass mere transmittal requirements. OMB itself has stated that "[an] agency's 'obtaining or soliciting of facts or opinions' from the public is the keystone of the definition of 'collection of information.' Some disclosure requirements do not involve any such action." 48 Fed. Reg. 13675 (1983). In OMB's words, "disclosure and labeling requirements are covered [by the PRA]

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[10] Of the three provisions at issue, then, only the provision relating to consumer products involves any requirement relating to the development of information, and then only because OMB disapproved the application of the HCS to consumer products altogether, thus eliminating the obligation of chemical manufacturers and importers to prepare MSDSs and labels for such products. Even there, OMB overreached in striking down the Standard's *training* requirement—which is plainly outside the PRA's scope—insofar as that requirement applies to consumer products.

[11] The Government states, for example, that the multi-employer worksite provision "requires employers to gather and keep records at a specific site." *Id.* This begs the question, because the point is that the records to which the Government refers are MSDSs *prepared by others*.

only to the extent that they implicitly or explicitly require a person to collect information for the purpose of the disclosure or labeling." *Id.* Thus, for example, OMB has acknowledged that the requirement of placing warning labels on cigarette packages does not constitute a collection of information because the persons subject to the requirement do not have to develop the information contained in the warnings, but "need only transmit to the public" information provided by another (in that case, the federal Government). *Id.*

Because the provisions at issue here, with one limited exception, require only transmittal of information prepared by others, those provisions would not constitute "information collection requests" even if the Government were correct in its position on the only question its petition asks this Court to address.

2. Our showing to this point is that the question the Government seeks to present—*viz*, whether the PRA applies to information developed solely for use by private parties, rather than for use by a government agency—is not significant to the proper resolution of even this highly unusual case. We now show that putting that consideration aside the petition should be denied because the Government's position on its question presented is wrong.[12]

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[12] We note in passing that there is no conflict in the circuits on this question. The Government's petition cites one decision, *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *pet. for cert. pending* (No. 88-849), which is contended to be "at odds" with the present decision, albeit "not in square conflict," since *Action Alliance* arose under the Federal Reports Act, not the PRA, Pet. at 27-28. But the petition's candor does not go far enough: as the Third Circuit demonstrated, Pet. App. at 9a, the two decisions are not even "at odds." *Action Alliance* involved information required to be collected for the potential use *of the Government, see* 846 F.2d at 1452, 1453, and the D.C. Circuit held only that the PRA is applicable to such an information collection request even where the information has not actually been *delivered* to the Government. *Id.* at 1453-54. But the Standard here requires information to be developed and provided solely

The language of the PRA strongly supports the proposition that the statute applies only to information collected for governmental use. "Practical utility," the criterion that guides OMB's determination whether to approve agency rulemaking, *see* 44 U.S.C. § 3508, is defined in the Act as "*the ability of an agency* to use information *it* collects, particularly the capability to process such information in a timely and useful fashion." § 3502(16) (emphasis added).[13] On the other side of the coin, the "burden" of paperwork requirements, which the PRA is intended to "minimize," § 3501(1), is defined as "the time, effort, or financial resources expended by persons to provide information *to a Federal agency*" § 3502(3) (emphasis added). In addition, 44 U.S.C. § 3512, which spells out the consequence of OMB's failure to approve an information collection request, provides that in the absence of such approval "no person shall be subject to any penalty for failing to maintain or provide information *to any agency*" (emphasis added). And the Senate Report accompanying the legislation gives numerous examples of "federal paperwork requirements," every

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for use by employees, not for use by the Government, and as we show in text that is a decisive difference.

We also note that the regulations erroneously described by the Government as "substantially identical" to the HCS, Pet. at 18, all require the development and compilation of information, not merely the transmittal of information prepared by others. The same is true of the disclosure requirements discussed in the legislative history cited in the Petition at 25-26.

[13] Under the Act, consideration of "practical utility," as so defined, is part of the determination "whether the collection of information *by an agency* is necessary for the proper *performance of the functions of the agency*. . . ." 44 U.S.C. § 3508 (emphasis added). Thus, the PRA applies only to information collected for use by an agency in the performance of its functions, as distinguished from information which serves to effectuate federal law or policy in some other way. The information generated by the HCS to be provided to employees certainly serves to effectuate the policies of the OSH Act, but the information is *not* used by OSHA for the "performance of [the Agency's] functions."

one of which involves provision of information *to the Government.* S. Rep. No. 930, 96th Cong., 2d Sess. 3-4 (1980).[14]

The Government's petition emphasizes that OMB has published a regulation proclaiming that OMB has authority to review and disapprove agency requirements "that a person 'provide information to another person.' " Pet. at 22, quoting 5 C.F.R. § 1320.7(s). It remains the law, however, that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977) (footnote omitted). OMB's views on this subject are certainly not entitled to the fullest measure of deference.[15] "An agency may not finally decide the limits of its statutory power," *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), and that point applies with special force in this case, where the provision upon which OMB relies, and which OMB promulgated, serves to aggrandize OMB's own jurisdiction and authority.

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[14] None of the legislative history cited by the Government (Pet. at 25-27) or ABC (Pet. at 19) is to the contrary. For example, in discussing SEC disclosure requirements the Senate Report cited by the Government describes the objects of those requirements as "documents *filed with the Securities and Exchange Commission* by issuers of securities . . . ," and the Report states in that connection that the statutory concept of "practical utility" turns on "*whether the agency can use the information* either to carry out its regulatory or other functions or to make it available to the public. . . ." S. Rep. No. 930, *supra*, at 39-40 (emphasis added), quoted in the Government's petition at 26. Thus the discussion of public disclosure in the Report refers to disclosure *by an agency* of documents *filed with it.*

[15] As the statutory provisions cited above indicate, this is not a case where Congress "did not have a specific intention on [the question presented]," *Chevron U.S.C. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984), and left a "gap" for OMB to fill, *id.* at 843, quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted,

ELIHU I. LEIFER
VICTORIA L. BOR
CHRISTOPHER S. RICHARDSON
1125 15th Street, N.W.
Washington, D.C. 20005

GEORGE H. COHEN
JEREMIAH A. COLLINS
JOHN ROTHCHILD
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD *
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
* Counsel of Record